

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

THE COAST WINERIES, Inc., a corporation, and
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

MAY 11 1942

PAUL P. O'BRIEN,

No. 10061

United States
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,

United States District Attorney,
1012 U. S. Courthouse,
Seattle, Wash.

THOMAS R. WINTER,

Special Attorney for the Bureau of
Internal Revenue
901 Federal Office Bldg.,
Seattle, Wash.

Attorneys for Plaintiff and Appellant.

HUBBERT & MULLINS,

402 Miller Bldg.,
Yakima, Washington.

ALLEN, FROUDE & HILEN

1308-16 Northern Life Tower
Seattle, Washington.

GERALD DeGARMO

1308-16 Northern Life Tower
Seattle, Washington.

Attorneys for Defendants and Appellee. [1*]

United States District Court, Western District of
Washington, Northern Division.

No. 136

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE COAST WINERIES, INC., a corporation,
and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a Corporation,
Defendants.

COMPLAINT.

Comes now the plaintiff by and through J. Charles Dennis, United States Attorney for the Western District of Washington, its attorney, and for a cause of action against the defendants alleges:

I.

That the United States of America, plaintiff herein, was at all times herein mentioned, and now is a corporation sovereign.

II.

That at all times herein mentioned, the defendant, United States Fidelity and Guaranty Company, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to do business, and

doing a general surety-ship business, in the State of Washington.

III.

That the defendant, The Coast Wineries, Inc., was at all times herein mentioned a corporation organized and doing [2] business under and by virtue of the laws of the State of Washington with its principal place of business at Yakima, Washington.

IV.

That The Coast Wineries, Inc. was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes, the defendant, The Coast Wineries, Inc. as principal, and the United States Fidelity and Guaranty Company as surety, on February 1, 1934, executed a bond in the sum of \$5,000.00, and on August 9, 1934, the said defendants executed an additional bond in the sum of \$3,000.00, true and correct copies of which said bonds are hereto attached marked Exhibits A and B respectively.

V.

That during the time the said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and other ingredients, thereby incurring a tax on such wines at the rate of .30¢ per gallon.

VI.

That by reason of the mixing of such wines, the Collector of Internal Revenue levied and assessed against The Coast Wineries, Inc. a tax for \$3,162.56, at .30¢ per gallon on 10,541.88 proof gallons. Said assessment being entered on the Collector's books D. S. 1935, February 1, Supple 0/0. [3]

VII.

That thereafter the Collector of Internal Revenue notified the said defendant of the levy and assessment as aforesaid and demanded payment thereof, and thereafter demand was also made upon the United States Fidelity and Guaranty Company.

VIII.

That no part of said taxes, penalties and interest has been paid and the defendants refuse to pay the same.

Wherefore, the plaintiff prays that judgment be entered against the defendants jointly and severally for the sum of \$3,162.56, together with interest and penalties and all costs, and such other further relief as to this Honorable Court seems just and proper.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Asst. United States Attorney. [4]

EXHIBIT A

Form 699

Treasury Department

Bureau of Industrial Alcohol

November, 1933

BOND OF WINEMAKER OR DEALER

Know All Men By These Presents, That The Coast Wineries, Inc. under the laws of the State of Washington of Yakima, Washington, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, Inc. under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the sum of Five Thousand and No/100 dollars (\$5,000.00), lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

This bond shall not in any case be effective before the first day of February, 1934, but if accepted by the United States it shall be effective according to its terms on and after that date without notice to the obligors. If this blank date is not filled in the date of execution shall be the effective date of the bond.

Whereas the above-bounden principal is engaged or intends to engage in business of MAKING AND selling domestic wines on premises located at 213 West "C" Street, Yakima, Washington, in the collection district of Washington.

“Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect.”

Witness our hands and seals this 1st day of February, 1934.

(Seal) THE COAST WINERIES, INC.

By /s/ E. G. McKENZIE, Pres.

/s/ M. V. HUBBERT, Sec.-Treas.

(Seal) UNITED STATES FIDELITY
AND GUARANTY COMPANY

/s/ D. H. McCOLLISTER,

Attorney-in-fact.

Signed, sealed, and delivered in the presence of—

/s/ C. F. COWDEN

/s/ J. C. BEESON

Approved Mar. 22, 1934

/s/ O. K. NICKERSON

Acting Dist. Supervisor 12th District.

The rate of premium on this bond is 20.00 per thousand; the total amount of premium charged is \$100.00.

Note. Words capitalized to be stricken out when bond is given by a dealer only. [5]

EXHIBIT B

Form 699

Treasury Department

Bureau of Industrial Alcohol

November, 1933

BOND OF WINEMAKER OR DEALER.

Know All Men By These Presents, That The Coast Wineries, Inc., a corporation, incorporated under the laws of the State of Washington, of Yakima, Wash., as principal, and United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, and..... of....., as sureties, are held and firmly bound unto the United States of America in the sum of Three Thousand and no/100 Dollars (\$3,000.00), lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

This bond shall not in any case be effective before the 9th day of August, 1947, but if accepted by the United States it shall be effective according to its terms on and after that date without notice to the obligors. If this blank date is not filled in the date of execution shall be the effective date of the bond.

Whereas the above-bounden principal is engaged or intends to engage in business of MAKING AND selling domestic wines on premises located at 213 W. "C" Street, Yakima in the Twelfth collection district of Washington.

Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 9th day of August, 1934.

(Seal) THE COAST WINERIES, INC.
E. G. McKENZIE, Vice
By MAUDE V. HUBBARD,
Secy-Treas.

(Seal) UNITED STATES FIDELITY
& GUARANTY COMPANY

(Seal) By JOHN C. M. COLLISTER
Attorney-in-fact [6]

Signed, sealed, and delivered in the presence of
LOETA HERSCHI

Approved August 20, 1934.

ROY C. LYLE

Astg. Dist. Supervisor 15th District.

Note.—Words capitalized to be stricken out when
bond is given by dealer only.

The rate of premium on this bond is \$20.00 per
thousand: the total amount of premium charged is
\$60.00. [7]

United States of America
Western District of Washington
Northern Division—ss.

Gerald Shucklin, being first duly sworn, on oath deposes and says:

That he is Assistant United States Attorney for the Western District of Washington and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

(Sgd.) GERALD SHUCKLIN

Subscribed and sworn to before me this 15th day of December, 1939.

(Seal) (Sgd.) R. B. ALLEN

Deputy Clerk, U. S. District
Court, Western District of
Washington. [8]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 15, 1939. Elmer Dover, Clerk, By R. B. Allen, Deputy.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNITED STATES
FIDELITY AND GUARANTY COMPANY,
a Corporation.

Comes now the United States Fidelity and Guaranty Company, a corporation, one of the defendants in the above entitled action, and for answer to the Complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Admits each and every allegation of Paragraphs I and II of the plaintiff's Complaint, and the whole of said paragraphs.

II.

For answer to Paragraph III of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was at one time a corporation organized and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington; and denies the remainder of said paragraph. [9]

III.

For answer to Paragraph IV of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines at

the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit A"; and on August 9, 1934 the defendant The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit B"; and except as herein specifically admitted, denies each and every other allegation in said paragraph contained.

IV.

For answer to Paragraph V of the plaintiff's Complaint, specifically denies that during the time said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and/or other ingredients, or that a tax was incurred to the United States of America on such wines at the rate of 30¢ per gallon, or any sum whatsoever.

V.

For answer to Paragraph VI of the plaintiff's Complaint, admits that the Collector of Internal Revenue [10] claims to have levied and assessed against The Coast Wineries, Inc., on account of the

alleged mixing of such wines, a tax for \$3,162.56, at 30¢ per gallon on 10,541.88 proof gallons, and that said assessment was entered on the Collector's books D. S. 1935, February 1, Supple O/O; and denies each and every other allegation in said paragraph contained not herein specifically admitted.

VI.

For answer to Paragraph VII of said Complaint, admits that prior to the commencement of this action demand was made upon the United States Fidelity and Guaranty Company to pay the claimed taxes, as sued upon herein, and states that it does not have sufficient knowledge or information upon which to form a belief as to the truth or falsity of the other allegations of said paragraph and, therefore, denies the same.

VII.

For answer to Paragraph VIII of the plaintiff's Complaint, admits that this answering defendant, the United States Fidelity and Guaranty Company, a corporation, has refused and now refuses to pay the taxes as claimed by the plaintiff herein, and denies the other allegations in said paragraph contained not herein specifically admitted.

And by way of further answer to the plaintiff's complaint, and as a first affirmative defense thereto, the United States Fidelity and Guaranty Company, a corporation, defendant herein, alleges:

I.

That subsequent to the execution by the defendant, United States Fidelity and Guaranty Company, as surety, of the bonds, copies of which are attached to the plaintiff's Complaint, as "Exhibit A" and "Exhibit B", [11] and subsequent to the assessment by the Collector of Internal Revenue of the taxes as claimed by Paragraph VI of the Complaint herein, said The Coast Wineries, Inc. was adjudicated a bankrupt in the United States District Court for the Eastern District of Washington, Southern Division, under Cause Number B-1959; and that subsequent to said adjudication in bankruptcy a trustee was appointed for said bankrupt corporation and sufficient funds and assets came into the hands of said Trustee in Bankruptcy, to pay and discharge all claims for taxes due, or asserted as being due, from said The Coast Wineries, Inc. to the United States of America.

II.

That pursuant to the direction of the Commissioner of Internal Revenue for the United States of America, there was filed in said bankruptcy proceeding on March 4, 1935 a claim by the United States of America, through Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington for \$9387.21, plus interest of 1% per month from March 1, 1935 to date paid, covering taxes claimed against The Coast Wineries,

Inc., for the years 1934-1935 on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, a true and correct copy of which said claim, as filed with the Trustee in Bankruptcy, and with the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, is attached hereto as "Exhibit A", and is by this reference thereto made a part hereof the same as though set forth in full herein, and which claim was thereafter, and on or about October 15, 1935, pursuant to a claim for abatement of said tax, filed [12] by the Trustee in Bankruptcy of The Coast Wineries, Inc., duly abated and said claim was withdrawn in said bankruptcy proceeding, in accordance with a letter from Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, addressed to the Clerk of the District Court for the Eastern District of Washington, dated October 15, 1935, a true and correct copy of which is attached hereto as "Exhibit B" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein.

III.

That thereafter, and on April 15, 1937, there was filed with the United States Clerk for the Eastern District of Washington, Southern Division, In the Matter of the Bankruptcy of Coast Wineries, Inc., being bankruptcy Cause Number B-1959, a

claim of the United States of America against The Coast Wineries, Inc. for the sum of \$3,162.56, plus interest at 1% for each full month from March 1, 1935 to August 30, 1935, and at one-half of 1% for each full month from August 30, 1935 to date paid, being a claim for the taxes on distilled spirits assessed against The Coast Wineries, Inc., under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, for the three months ending June 30, 1934, a true and correct copy of which said claim, as filed in said bankruptcy proceeding, is attached hereto as "Exhibit C" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the said claim covering the identical amount and taxes sought to be recovered by the plaintiff herein. [13]

IV.

That thereafter, said claim as mentioned in the preceding paragraph was disallowed and rejected by the Trustee in Bankruptcy of The Coast Wineries, Inc., and by the Special Master appointed by the United States District Court for the Eastern District of Washington, Southern Division, to hear matters in connection with said bankruptcy proceeding, and thereafter came on regularly for allowance, or disallowance, and for approval of the report of the Special Master, before the Honorable J. Stanley Webster, Judge of the United States Dis-

trict Court for the Eastern District of Washington, on the 5th day of October, 1937, the United States of America being duly represented by an Assistant United States Attorney at said hearing, and after a hearing thereon said claim was disallowed in full, and on the 12th day of November, 1937, an order was entered, duly denying and expunging said claim, a true and correct copy of which is attached hereto as "Exhibit D" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein; and that no appeal was thereafter taken from said order by the United States of America, and by reason thereof, and said proceeding as aforesaid, said adjudication and order are res adjudicata as to the claim of the plaintiff as asserted in this action against this answering defendant.

And by way of further answer to the plaintiff's Complaint, and as a second affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

That at the time of the adjudication in bankruptcy of The Coast Wineries, Inc. there were on hand, as an asset [14] of said The Coast Wineries, Inc. unused revenue stamps in the sum of \$737.22,

and that subsequent to the adjudication of the bankruptcy of The Coast Wineries, Inc. and the appointment and qualification of the Trustee in said bankruptcy, there was filed by said Trustee in Bankruptcy of The Coast Wineries, Inc., with the United States of America, a claim for refund and redemption of surplus Internal Revenue Stamps, which was thereafter allowed by the Comptroller General of the United States of America in the sum of \$732.22; and that subsequent to the allowance of said claim for refund, and with full knowledge of the claim asserted herein for taxes claimed to be due the United States of America from The Coast Wineries, Inc., said United States of America failed to apply said credit against said claimed taxes due from The Coast Wineries, Inc., but to the contrary paid said sum of \$732.22 to the Trustee in Bankruptcy of The Coast Wineries, Inc. by check on January 13, 1939.

Wherefore, having fully answered the Complaint of the plaintiff herein, the defendant, United States Fidelity and Guaranty Company, a corporation, respectfully prays that the Complaint of the plaintiff herein be dismissed as to it, with prejudice and with costs, in favor of this answering defendant; and in the alternative, and in the event only that it should be adjudged and determined that the United States Fidelity and Guaranty Company, a corporation, is indebted to the United States of America for any portion of the claimed taxes, as

sued upon herein, that a set-off be allowed against such claimed taxes in the sum of \$732.22, and that the Court may grant such [15] other and further relief in the premises as may seem just, equitable and proper.

ALLEN, FROUDE & HILEN
HUBBERT & MULLINS

Attorneys for Defendant,
United States Fidelity and
Guaranty Company, a corporation.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath, deposes and says:

That he is an attorney at law and a member of the law firm of Allen, Froude & Hilen, and as such is one of the attorneys for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification for and on behalf of said defendant for the reason that said defendant is a foreign corporation and that it has no officer or agent within the State of Washington qualified to verify this Answer on its behalf, and that he is one of the attorneys as aforesaid; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

GERALD DeGARMO

Subscribed and sworn to before me this 9th day of October, 1940.

(Seal) G. M. HUTCHINSON

Notary Public in and for the State of Washington,
residing at Seattle.

Rec'd copy 12-9-40.

J. CHARLES DENNIS

U. S. Attorney. [16]

EXHIBIT "A"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States
for the Eastern District of Washington
Southern Division

In Bankruptcy No. B-1959

In the Matter of

COAST WINERIES, INC.

Debtor

Comes Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Inc. Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved.—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period.—1934-1935.

Amount of Tax.—\$9387.21.

Interest Provisions.—Plus interest of 1% per month from March 1, 1935 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 28th day of February, 1935.

ALEX McK. VIERHUS

Collector of Internal Revenue
for the Collection District of
Washington

Sworn to and subscribed before me this 28th day
of February, 1935.

E. G. CLARKE

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court
Eastern Dist. of Washington March 4, 1935 A. A.
LaFramboise, Clerk Thomas Granger, Deputy. [17]

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Tacoma, Wash.

Office of the Collector
District of Washington

October 15, 1935

In replying refer to
Clerk of the District Court for the
Eastern District of Washington
Spokane, Washington

Dear Sir:

In re: Coast Wineries, Inc.
Yakima, Washington
(Bankrupt)

Reference is made to our claim #2 filed under date of June 7, 1935 covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.

Respectfully,

ALEX. McK. Vierhus,
Collector

By (signed) THOR W. HENRICKSEN

Assistant to the Collector

EB:MW

[Endorsed]: Filed in the U. S. District Court Eastern Dist. of Washington October 17, 1935 A. A. LaFranboise, Clerk Thomas Granger, Deputy No. 1959 Trustee's Exhibit J. Admitted Oct. 18, 1935.
[18]

EXHIBIT "C"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

In Bankruptcy No. B-1959

In the matter of

COAST WINERIES, Incorporated
Bankrupts,

Comes Thor W. Henricksen—Acting, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Incorporated Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period—3 mo. ending 6/30/34.

Amount of Tax—\$3,162.56.

Interest Provisions—Plus interest at 1% for each full month from 3/1/35—8/30/35 and at $\frac{1}{2}$ of 1% for each full month from 8/30/35 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 13 day of April 1937

(Signed) THOR W. HENRICKSEN

Acting Collector of Internal
Revenue for the Collection
District of Washington

Sworn to and subscribed before me this 13 day
of April 1937.

H. WOODWORTH

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court
Eastern Dist. of Washington April 15, 1937 A. A.
LaFramboise, Clerk Thomas Granger, Deputy. [19]

EXHIBIT "D"

In the District Court of the United States for the
Eastern District of Washington Southern Di-
vision.

No. B-1959

In the Matter of the Relief of
THE COAST WINERIES, INC.
a corporation,

Bankrupt.

ORDER.

The above matter coming on regularly for hear-
ing on the 5th day of October, 1937, on the claim
of the United States of America covering taxes

assessed under Section 3244 and 3126 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest, said claim having been filed by the acting collectors of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, at it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

Now, therefore, on oral motion of the trustee in bankruptcy it is,

Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of Wash-
ington.

To all of which order the United States of America, claimant, excepts, and said exception is hereby allowed.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of Wash-
ington.

Approved as to form:

- S. R. CLEGG,
Asst. U. S. Atty.

Approved as to form:

CLARK & GRADY,
Attorneys for Trustee

[Endorsed]: Filed in the U. S. District Court
Eastern District of Washington Nov. 12, 1937 A. A.
LaFramboise, Clerk by Thomas Granger, Deputy.

[Endorsed]: Filed Oct. 9, 1940. Millard P.
Thomas, Clerk. By R. Elias, Deputy. [20]

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT,
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, A CORPORATION.

Comes now the United States Fidelity and Guaranty Company, a corporation, one of the defendants in the above entitled action, and for this its Amended Answer to the Complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Admits each and every allegation of Paragraphs I and II of the plaintiff's Complaint, and the whole of said paragraphs.

II.

For answer to Paragraph III of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was at one time a corporation organized and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington; and denies the remainder of said paragraph.

III.

For answer to Paragraph IV of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was [21] engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines

at the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit A"; and on August 9, 1934 the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit B"; and except as herein specifically admitted, denies each and every other allegation in said paragraph contained.

IV.

For answer to Paragraph V of the plaintiff's Complaint, specifically denies that during the time said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and/or other ingredients, or that a tax was incurred to the United States of America on such wines at the rate of 30¢ per gallon, or any sum whatsoever.

V.

For answer to Paragraph VI of the plaintiff's Complaint, denies that there was any levy or assessment by the Collector of Internal Revenue against The Coast [22] Wineries, Inc. of a tax for \$3,162.56,

at 30¢ per gallon on 10,541.88 proof gallons of wine, or at all; or that such an assessment was entered on the Collector's books D. S. 1935, February 1, Supple O/O.

VI.

For answer to Paragraph VII of said Complaint, admits that prior to the commencement of this action demand was made upon the United States Fidelity and Guaranty Company to pay the claimed taxes, as sued upon herein, and states that it does not have sufficient knowledge or information upon which to form a belief as to the truth or falsity of the other allegations of said paragraph and, therefore, denies the same.

VII.

For answer to Paragraph VIII of the plaintiff's Complaint, admits that this answering defendant, the United States Fidelity and Guaranty Company, a corporation, has refused and now refuses to pay the taxes as claimed by the plaintiff herein; and denies the other allegations in said paragraph contained not herein specifically admitted.

And by way of further answer to the plaintiff's Complaint, and as a first affirmative defense thereto, the United States Fidelity and Guaranty Company, a corporation, defendant herein, alleges:

I.

That subsequent to the execution by the defendant, United States Fidelity and Guaranty Company,

as surety, of the bonds, copies of which are attached to the plaintiff's Complaint, as "Exhibit A" and "Exhibit B", and subsequent to the claimed assessment by the Collector [23] of Internal Revenue of the taxes as claimed by Paragraph VI of the Complaint herein, said The Coast Wineries, Inc. was adjudicated a bankrupt in the United States District Court for the Eastern District of Washington, Southern Division, under Cause Number B-1959; and that subsequent to said adjudication in bankruptcy a trustee was appointed for said bankrupt corporation and sufficient funds and assets came into the hands of said Trustee in Bankruptcy, to pay and discharge all claims for taxes due, or asserted as being due, from said The Coast Wineries, Inc. to the United States of America.

II.

That pursuant to the direction of the Commissioner of Internal Revenue for the United States of America, there was filed in said bankruptcy proceeding on March 4, 1935 a claim by the United States of America, through Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington for \$9387.21, plus interest of 1% per month from March 1, 1935 to date paid, covering taxes claimed against The Coast Wineries, Inc., for the years 1934-1935 on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, a true and correct copy of which said claim, as filed

with the Trustee in Bankruptcy, and with the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, is attached hereto as "Exhibit A", and is by this reference thereto made a part hereof the same as though set forth in full herein, and which claim was thereafter, and on or about October 15, 1935, pursuant to a claim for abatement of said tax, filed [24] by the Trustee in Bankruptcy of The Coast Wineries, Inc., duly abated and said claim was withdrawn in said bankruptcy proceeding, in accordance with a letter from Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, addressed to the Clerk of the District Court for the Eastern District of Washington, dated October 15, 1935, a true and correct copy of which is attached hereto as "Exhibit B" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein.

III.

That thereafter, and on April 15, 1937, there was filed with the United States Clerk for the Eastern District of Washington, Southern Division, In the Matter of the Bankruptcy of Coast Wineries, Inc., being Bankruptcy Cause Number B-1959, a claim of the United States of America against The Coast Wineries, Inc. for the sum of \$3,162.56, plus interest at 1% for each full month from March 1, 1935 to August 30, 1935, and at one-half of 1% for

each full month from August 30, 1935 to date paid, being a claim for the taxes on distilled spirits assessed against The Coast Wineries, Inc., under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, for the three months ending June 30, 1934, a true and correct copy of which said claim, as filed in said bankruptcy proceeding is attached hereto as "Exhibit C" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the said claim covering the identical amount and taxes sought to be recovered by the plaintiff herein. [25]

IV.

That thereafter, said claim as mentioned in the preceding paragraph was disallowed and rejected by the Trustee in Bankruptcy of The Coast Wineries, Inc., and by the Special Master appointed by the United States District Court for the Eastern District of Washington, Southern Division, to hear matters in connection with said bankruptcy proceeding, and thereafter came on regularly for allowance, or disallowance, and for approval of the report of the Special Master, before the Honorable J. Stanley Webster, Judge of the United States District Court for the Eastern District of Washington, on the 5th day of October, 1937, the United States of America being duly represented by an Assistant United States Attorney at said hearing,

and after a hearing thereon said claim was disallowed in full, and on the 12th day of November, 1937 an order was entered, duly denying and expunging said claim, a true and correct copy of which is attached hereto as "Exhibit D" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein; and that no appeal was thereafter taken from said order by the United States of America, and by reason thereof, and said proceeding as aforesaid, said adjudication and order are res adjudicata as to the claim of the plaintiff as asserted in this action against this answering defendant.

And by way of further answer to the plaintiff's Complaint, and as a second affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

Defendant realleges and reavers each and every [26] allegation as contained in Paragraphs I and II of its first affirmative defense herein, and by this reference thereto incorporates said paragraphs, and the allegations thereof, into this paragraph of the second affirmative defense the same as though set forth in full herein.

II.

That in reliance upon the facts that the plaintiff had filed its claims, as aforesaid, in the bankruptcy

proceedings of The Coast Wineries, Inc., that sufficient funds and assets were in the hands of the Trustee in Bankruptcy of The Coast Wineries, Inc. to pay said claims in full, the notification of defendant by plaintiff of the intention of plaintiff to proceed against the bankrupt estate upon said claims to the extent of the assets available for the payment of said claims in the bankruptcy proceedings, and the subsequent abatement of said creditor's claim, as attached hereto as "Exhibit A", and of the tax therein sought to be recovered, the defendant, United States Fidelity and Guaranty Company, refrained from filing any claim for contingent liability in The Matter of the Bankruptcy of Coast Wineries, Inc., and refrained from prosecuting or filing any claim against the Estate of N. J. Dolph, one of the indemnitors upon the bonds sued upon herein within the time limited by law for the filing of claims of creditors, and thereby lost all right to participate either in the assets of the bankruptcy estate of The Coast Wineries, Inc., or of the Estate of N. J. Dolph, Deceased, as to any liability upon said bonds as sued upon by plaintiff herein, and by virtue of the facts aforesaid the bonds of defendant, United States Fidelity and Guaranty Company sued upon herein were cancelled and [27] terminated, and all liability of the defendant thereunder, for the claimed taxes sought to be collected herein, determined.

And by way of further answer to the plaintiff's Complaint, and as a third affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

That at the time of the adjudication in bankruptcy of The Coast Wineries, Inc. there were on hand, as an asset of said The Coast Wineries, Inc. unused revenue stamps in the sum of \$737.22, and that subsequent to the adjudication of the bankruptcy of The Coast Wineries, Inc. and the appointment and qualification of the Trustee in said bankruptcy, there was filed by said Trustee in Bankruptcy of The Coast Wineries, Inc., with the United States of America, a claim for refund and redemption of surplus Internal Revenue Stamps, which was thereafter allowed by the Comptroller General of the United States of America in the sum of \$732.22; and that subsequent to the allowance of said claim for refund, and with full knowledge of the claim asserted herein for taxes claimed to be due the United States of America from The Coast Wineries, Inc., said United States of America failed to apply said credit against said claimed taxes due from The Coast Wineries, Inc., but to the contrary paid said sum of \$732.22 to the Trustee in Bankruptcy of The Coast Wineries, Inc. by check on January 13, 1939.

Wherefore, having fully answered the Complaint of the plaintiff herein, the defendant, United States

Fidelity and Guaranty Company, a corporation, respectfully prays that the Complaint of the plaintiff herein be dismissed as to it, with prejudice and with costs, in favor [28] of this answering defendant; and in the alternative, and in the event only that it should be adjudged and determined that the United States Fidelity and Guaranty Company, a corporation, is indebted to the United States of America for any portion of the claimed taxes, as sued upon herein, that a set-off be allowed against such claimed taxes in the sum of \$732.22, and that the Court may grant such other and further relief in the premises as may seem just, equitable and proper.

ALLEN, FROUDE & HILEN
and

HUBBERT & MULLINS

By GERALD DeGARMO

Attorneys for Defendant,
United States Fidelity and
Guaranty Company, a corporation.

1308-1316 Northern Life Tower,
Seattle, Washington.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath, deposes and says:

That he is an attorney at law and a member of the law firm of Allen, Froude & Hilén, and as such

is one of the attorneys for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification for and on behalf of said defendant for the reason that said defendant is a foreign corporation, and that it has no officer or agent within the State of Washington qualified to verify this Amended Answer on its behalf, and that he is one of its attorneys as aforesaid; that he has read the foregoing Amended Answer, knows the contents thereof and believes the same to be true.

GERALD DeGARMO

Subscribed and sworn to before me this 3rd day of April, 1941.

(Seal)

G. M. HUTCHINSON

Notary Public in and for the State of Washington,
residing at Seattle.

Received a copy of the within Motion this 3d day of April, 1941.

J. CHARLES DENNIS,
Atty. for U. S. [29]

EXHIBIT "A"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

In Bankruptcy No. B-1959

In the matter of

COAST WINERIES, INC.,

Debtor.

Comes Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Inc. Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved.—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period.—1934-1935.

Amount of Tax.—\$9387.21.

Interest Provisions.—Plus interest of 1% per month from March 1, 1935, to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 28th day of February, 1935.

ALEX McK. VIERHUS

Collector of Internal Revenue
for the Collection District of
Washington.

Sworn to and subscribed before me this 28th day of February, 1935.

E. G. CLARKE

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court,
Eastern Dist. of Washington, March 4, 1935. A. A.
LaFramboise, Clerk, Thomas Granger, Deputy.

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Tacoma, Wash.

Office of the Collector
District of Washington

October 15, 1935

in replying refer to
Clerk of the District Court for the
Eastern District of Washington
Spokane, Washington

Dear Sir:

In re: Coast Wineries, Inc.
Yakima, Washington
(Bankrupt)

Reference is made to our claim #2 filed under date of June 7, 1935, covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.

Respectfully,
ALEX McK. VIERHUS,
Collector.

(Signed) By THOR W. HENRICKSEN
Assistant to the Collector.

EB:MW

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington, October 17, 1935. A. A. LaFramboise, Clerk. Thomas Granger, Deputy. No. 1959. Trustee's Exhibit J. Admitted Oct. 18, 1935. [31]

EXHIBIT "C"

STATEMENT OF CLAIM FOR TAXES DUE THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

In Bankruptcy—No. B1959

In the Matter of

COAST WINERIES, INCORPORATED,

Bankrupts.

Comes Thor W. Henricksen—Acting, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Incorporated Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period—3 mo. ending 6/30/34.

Amount of Tax—\$3,162.56.

Interest Provisions—Plus interest at 1% for each full month from 3/1/35-8/30/35 and at $\frac{1}{2}$ of 1% for each full month from 8/30/35 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being *dully* determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 13th day of April, 1937.

(Signed)

THOR W. HENRICKSEN

Acting Collector of Internal
Revenue for the Collection
District of Washington.

Sworn to and subscribed before me this 13th day of April, 1937.

H. WOODWORTH

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court,
Eastern Dist. of Washington, April 15, 1937. A. A.
LaFramboise, Clerk. Thomas Granger, Deputy.

[32]

EXHIBIT "D"

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

No. B-1959

In the Matter of the Relief of
THE COAST WINERIES, INC.,
a corporation,

Bankrupt.

ORDER

The above matter coming on regularly for hear-
ing on the 5th day of October, 1937, on the claim
of the United States of America covering taxes as-
sessed under Section 3244 and 3126 of Revised
Statutes and the Liquor Taxing Act of 1934 in the
sum of \$3,162.56 plus interest, said claim having
been filed by the acting collectors of Internal Reve-

nue for the District of Washington as agent for the United States of America on or about April 13, 1937, at it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

Now, Therefore, on oral motion of the trustee in bankruptcy it is,

Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of
Washington.

To all of which order the United States of America, claimant, excepts, and said exception is hereby allowed.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of
Washington.

Approved as to form:

S. R. CLEGG

Assist. U. S. Atty.

Approved as to form:

CLARK & GRADY

Attorneys for Trustee

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington, Nov. 12, 1937. A. A. LaFramboise, Clerk, by Thomas Granger, Deputy.

[Endorsed]: Filed Apr. 7, 1941. [33]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff by and through J. Charles Dennis, United States Attorney for the Western District of Washington, Northern Division, its attorney, and in reply to the amended answer, affirmative defenses and setoff of the defendant, United States Fidelity & Guaranty Company, alleges:

I.

The alleged amended answer does not state a valid defense to the plaintiff's action upon the bonds herein sued upon.

II.

The alleged first affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon.

III.

(1) Replying to Paragraph I of the alleged affirmative defense, plaintiff admits the allegations therein contained except plaintiff denies that sufficient funds and assets came into the hands of said trustee in bankruptcy to pay and discharge all claims for taxes due or asserted as being due from the said Coast Wineries, Inc., to the United States of America. [34]

(2) Replying to Paragraph II of the alleged first affirmative defense, plaintiff admits the allegations therein contained except defendant denies that the said proof of claim was filed with the trustee in bankruptcy but alleges it was filed with the Clerk of the United States District Court in a debtor reorganization proceedings under Section 77B of the Bankruptcy Act as amended. Plaintiff also denies that said claim was duly abated or that it was withdrawn pursuant to a claim for abatement having been filed by the trustee for the bankrupt.

(3) Replying to Paragraph III of the alleged first affirmative defense, plaintiff admits that there

was forwarded to the Clerk of the United States District Court and to the trustee in bankruptcy of the Coast Wineries, Inc., for filing the claim referred to therein and that the amount sought to be recovered in this action on the bonds is the identical amount of taxes set forth therein but plaintiff denies each and every other allegation therein contained.

(4) Referring to Paragraph IV of the alleged first affirmative defense, plaintiff denies that the claim mentioned in Paragraph III of said alleged affirmative defense was disallowed and rejected by the trustee in bankruptcy of the Coast Wineries, Inc. and by the Special Master, appointed by the United States District Court or that it thereafter came on regularly for allowance or disallowance on the 5th day of October, 1937, except that on said date upon the oral objection of the trustee to the filing of said claim on the ground that it had been withdrawn, the United States District Court, on November 12, 1937, entered the order attached to defendant's answer as Exhibit "D". Further replying to said paragraph, plaintiff [35] denies each and every other allegation therein contained.

IV.

The alleged second affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon.

V.

(1) Replying to Paragraph I of defendant's second cause of action, plaintiff refers to Paragraph

III (1) and (2) of its above reply to defendant's alleged first affirmative defense and by this reference incorporates the same as if set out *hoc verba*.

(2) Plaintiff denies the allegations contained in Paragraph II of defendants alleged second cause of action except as herein admitted.

VI.

The alleged third affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon or a valid setoff thereto.

VII.

Replying to Paragraph I of defendant's alleged third affirmative defense and setoff, plaintiff denies that at the time of the adjudication in bankruptcy of the Coast Wineries, Inc., there were on hand as an asset of said Coast Wineries, Inc., unused revenue stamps in the sum of \$737.22 but alleges that on September 14, 1935, the United States District Court in the bankruptcy proceedings of the Coast Wineries, Inc., entered an order providing in part as follows:

"It Is Further Adjudged and Decreed that the United States Government shall forthwith cause said wine to be inventoried and gauged and the amount of the normal gallonage or withdrawal tax ascertained as provided in Sections 442 and 450, as amended, U. S. C. A., [36] and the Yakima Valley Bank and Trust Company, as trustee, shall out of the funds hereto-

fore paid to it by R. D. Rovig purchase from the Collector of Internal Revenue the stamps required by said Sections and affix them to the containers as provided by law.”

That pursuant to said order, the trustee of the Coast Wineries, Inc., purchased stamps believed necessary to pay the normal gallonage or withdrawal tax as therein provided but that after the cancellation thereof the said trustee had on hand unused stamps in the sum of \$737.22 which were returned to the Collector of Internal Revenue for redemption under the Act of May 12, 1900, as amended (Title 25 U. S. C. A. 1424) and under the regulations promulgated by the Commissioner of Internal Revenue a claim was filed and redemption under said act authorized and paid.

Defendant denies each and every other allegation in said paragraph not herein admitted.

Wherefore, plaintiff having fully replied to defendant's alleged amended answer, first, second and third affirmative defenses and setoff, prays that these alleged defenses be stricken and denied and that it have judgment as prayed in its complaint.

J. CHARLES DENNIS

United States Attorney.

GERALD SHUCKLIN

Assistant United States
Attorney.

THOMAS R. WINTER

Special Attorney, Bureau of In-
ternal Revenue.

Copy of the within received 4/29/41.

ALLEN FROUDE & HILEN

Attorneys for Dft. U. S. F. & G.
Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, May 1, 1941. Millard P. Thomas, Clerk, by C. R. Fitzgerald, Deputy. [37]

[Title of District Court and Cause.]

DECISION

J. Chas. Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, for plaintiff. Thomas R. Winters, Special Attorney, Bureau of Internal Revenue. Allen, Froude & Hilen, and Hubbert & Millins, attorneys for the defendant.

Neterer, District Judge.

The corporate sovereignty of the plaintiff, and the corporate entity of the United States Fidelity and Guaranty Company, under the laws of the State of Maryland, and of the Coast Wineries, Inc., under the laws of the State of Washington are admitted. It is also admitted that the Coast Wineries, Inc., has engaged in the business of making and selling wines; that the United States Fidelity & Guaranty Company executed a bond to assure the faithful compliance with the laws of the United States by

the Coast Wineries, Inc.; that the Coast Wineries, Inc., was adjudicated, bankrupt June 16, 1935; that the Yakima Valley Bank and Trust Company was appointed Trustee, and was authorized to, and did employ, W. B. Clark and T. E. Grady its attorneys; that the substantial asset at the time of adjudication was a quantity of wine, the production and rectification of which is the basis of the Government's claim for which claim for tax on distilled spirits, assessed under Sec's 3244 and 3176 R. S.; and under liquor taxing act of 1934, was filed. This wine was by the court ordered sold by the Trustee for which \$12,500.00 was received. After sale the District Judge concluded that the wine should be delivered to the purchaser free and clear of tax, and directed the trustee to purchase, and affix to the containers, the necessary revenue stamps.

In addition to the claim in suit there were two other claims filed; one for \$76.20 assessed for documentary stamp tax under Tit. 5 part 3 of the Revenue Act of 1932, and one claim for \$501.67 as a capital stock assessment under Sec. 215 of the National Industrial Recovery Act. Objection was made to evidence of these claims at trial, and the ruling was reserved. The objection is overruled.

The plaintiff contends that testimony on these items is immaterial; the defendant contends that these items form the basis of a settlement and compromise of the issue before the court. That the Trustee had objected to these two items and upon

the statement of the attorney for plaintiff that an allow- [38] ance of these claims, the claim in issue would be abated. I am convinced there was conversation, and agreement between the attorney for the plaintiff and the attorney for the defendant which resulted in the withdrawal of the claim in suit, the withdrawal reads "reference is made to our claim #2 filed under date of June 7, 1935, covering tax on distilled spirits due from above named corporation in the amount of \$9,387.21.

"You are advised that upon the recommendation of the District Supervisor of the alcoholic unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock tax are still in effect."

The withdrawn claim #2 includes the claim in suit \$3,162.56; claims #1 and #3 cover the items for capital stock tax. The defendant contends that it was agreed by the plaintiff's representatives that the claim in suit would be abated if the other two claims were paid, thereupon Judge Grady, attorney for the Trustee, recommended to the Special Master that these two claims be paid. The claims were thereupon allowed by the Special Master. Upon report to the United States District Judge and after formal hearing, these two claims were allowed and the \$3,162.56 was denied by Judge Webster. The order entered by Judge Webster on the 12th day of November, 1937, reads as follows:

“The above matter coming on regularly for hearing on the 5th day of October, 1937, on the claim of the United States of America covering taxes assessed under Sections 3244 and 3176 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest; said claim having been filed by the Acting Collector of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, and it appearing to the court that the said claim of the United States was and is a part of the original claim of \$9,387.21 which was filed by the Collector of Internal Revenue for the District of Washington on or about February 28, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the said Special Master has disallowed and expunged said claim in his report, to which the exceptions were taken by the claimant, and which report to that extent has been approved by this court in its memorandum decision on file herein.

Now Therefore, on oral motion of the Trustee in bankruptcy, it is

Ordered, Adjudged and Decreed That the said claim of the United States in the sum of

\$3,162.56 filed on April 13, 1937, be, and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

To all of which order the United States of America, claimant except, and said exception is hereby allowed.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

Approved as to form:

S. R. CLEGG

Asst. U. S. Attorney

Approved as to form:

CLARK & GRADY

Attorneys for Trustee." [39]

"The order * * * was a final order binding as between the parties. There can be no question but that the jurisdiction of the bankruptcy court was properly exercised * * *." So said the Supreme court in *Sampsell v. Imperial Paper & Col. Corporation* in opinion filed April 28, 1941. (not reported) Commenting on a like order the Court further said "There was no appeal from the order entered * * *. It therefore could not be collaterally

attacked * * * .” A like status as here, the Supreme Court added “The power of the bankruptcy court * * * is complete.

This expression from the Supreme Court fixed the status of Judge Webster’s order.

The conclusion is inevitable that the issue is res adjudicata. The fact and right was directly in issue, and specifically determined by Judge Webster, who had jurisdiction of the subject matter, and of the parties, and the issue may not again be disputed in this case by the parties, or their privies. The question of res adjudicata was exhaustively discussed by the writer sitting in the Circuit Court of Appeals with Judge Gilbert and Judge Rudkin in U. S. vs. Sakharan Ganesh Pandit 15 Fed. (2d) 285. The opinion was unanimous. Certiorari was denied by the Supreme Court 273 U. S. 759. What is said in the “Pandit” case is applicable and decisive here.

The instant issue is distinguished from the Royal Indemnity Co. vs. U. S. decided by the Supreme Court May 26, 1941, in that the issue was the effect of a “*full payment of the tax and liability on the bond*”. (Italics supplied) and surrendered the bond, before its “obligation was fully satisfied”. In this case the Indemnity Company was bound to know the power of the agent (The Collector) and with this knowledge could not assert estoppel. In the instant case we have an adjudication of the claim by a court of competent jurisdiction, all

parties being before the court on formal hearing, exception to the judgment was noted, but no appeal was prosecuted. The same question was discussed in the Pandit case supra (15 Fed. (2d) 285) and upon that case and authorities there cited the plaintiff, here, must fail. The judgment of Judge Webster is final, even if erroneous, not having been appealed from, is *res adjudicata*.

The claim against the Wineries Company Inc. being disposed of the Surety is released. The bond is ancillary to the tax debt, and does not survive it.

The condition of the bond follows:

“Whereas the above-bounded principal is engaged * * * in business of making and selling domestic wines * * * in the Collection District of Washington.

Now Therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the U. S. and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and accounting of all wines produced, or received by him, and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; * * *

The bond was executed August 9, 1934, prior to the tax assessment.

This is not a bond to stay execution as in *U. S. vs. John Barth Co.* 279 U. S. 370 or to postpone payment of the tax as in *Grays Motor Co. vs. U. S.* 16 Fed. (2d) 367 or to refrain from collection at the time *Hughson vs. U. S.* 59 Fed. (2d) 17. [40]

Without discussing the question of estoppel, I will say, that I think, upon the record the plaintiff likewise is estopped from asserting its claim in suit.

Judgment for the defendant.

JEREMIAH NETERER,

United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 14, 1941. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This Cause having come on regularly for trial, before the undersigned Judge of the above entitled Court, on the 7th day of May, 1941, upon the Complaint of the plaintiff, the Amended Answer and Affirmative Defenses of the defendant, United States Fidelity and Guaranty Company, a corporation, and the Reply of the plaintiff thereto; and the plaintiff having appeared and having been represented by J. Charles Dennis, United States At-

torney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney for the Bureau of Internal Revenue; and the defendant, United States Fidelity and Guaranty Company, having appeared and having been represented by Allen, Froude & Hilen and Hubbert & Mullins, its attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, United States Fidelity and Guaranty Company, and exhibits having been introduced in evidence, and at the close of the trial the cause having been taken under advisement for the submission of briefs upon the facts, and such briefs having been submitted, and the Court on the 14th day of June, 1941 having filed its written decision herein; and the Court being fully advised now makes the following: [42]

FINDINGS OF FACT

I.

That the United States of America, plaintiff herein, was at all times herein mentioned and now is a corporation sovereign.

II.

That at all times herein mentioned the defendant, United States Fidelity and Guaranty Company, was and it now is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to do

business, and doing a general suretyship business, in the State of Washington.

III.

That for a number of years prior to 1937, and in particular during the years 1934 and 1935, The Coast Wineries, Inc., was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington.

IV.

That The Coast Wineries, Inc., was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines at the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the defendant, United States Fidelity and Guaranty Company, a corporation, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's complaint herein as "Exhibit A"; [43] and on August 9, 1934, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's complaint herein as "Ex-

hibit B"; and the obligations of which bonds were identical and as follows:

"Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the production, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect."

V.

That during the time the said bonds were in full force and effect, The Coast Wineries, Inc. mixed a quantity of wine with glycerine and other ingredients, by reason of which the Commissioner of Internal Revenue levied and assessed against The Coast Wineries, Inc. a tax for \$3,162.56, at 30¢ per gallon on 10,541.88 proof gallons, said assessment being entered on the Collector's book D. S. 1935, February 1, Supple 0/0.

VI.

That in February of 1935 The Coast Wineries, Inc. filed a Petition for corporate reorganization in the United States District Court for the Eastern

District of Washington, Southern Division, under Cause Number B-1959; and on February 27, 1935 the plaintiff herein, pursuant to the direction of the Commissioner of Internal Revenue, and acting through Alex McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, filed a Claim in [44] said proceedings for certain taxes, in the sum of \$501.67, plus interest of one (1%) per cent for each full month beginning September 9, 1934, covering capital stock tax assessed under Section 215 of the National Industrial Recovery Act for the fiscal year 1934; on March 4, 1935, filed a Claim in said proceedings for certain taxes, in the sum of \$9,387.21, plus interest of one (1%) per cent per month from March 1, 1935 to date paid (which Claim included the taxes assessed as mentioned in the preceding paragraph hereof, and which taxes are those sought to be recovered in this action), said taxes being claimed for the taxable years 1934 and 1935 as assessed on distilled spirits under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934, and a copy of which said Claim was introduced in evidence herein as defendant's "Exhibit A-1"; and on June 10, 1935 filed a Claim in said proceedings for certain taxes, in the sum of \$76.20, plus interest at the rate of one (1%) per cent per month beginning ten (10) days after the date of first demand notice, as a proposed assessment for the taxable years 1934 and 1935 of documentary stamp tax under Title V, Part III, Revenue Act of 1932, and a copy of which

said Claim was introduced in evidence herein as defendant's "Exhibit A-3".

VII.

That on June 16, 1935 The Coast Wineries, Inc., was duly adjudicated a bankrupt, and the Yakima Valley Bank and Trust Company was appointed as Trustee in Bankruptcy, and was authorized to and did employ W. B. Clark and T. E. Grady of Yakima, Washington, as its attorneys.

VIII.

That the only substantial asset of The Coast Wineries, Inc. was a quantity of wine, the production and rectification of which was the basis of the claim for taxes asserted [45] in this action, and as filed in the Bankruptcy of The Coast Wineries, Inc. as a part of its claim for \$9,387.21, and said wine was ordered sold by the Trustee in Bankruptcy of The Coast Wineries, Inc. for the sum of \$12,500.00. That subsequent to said sale the District Judge having charge of said Bankruptcy proceedings concluded that said wine should be delivered to the purchaser free and clear of tax, and directed the Trustee to purchase and affix to the containers the necessary Revenue Stamps, and pursuant to such direction the Trustee did purchase from the proceeds of the sale of said wine Internal Revenue Stamps, in the total sum of \$9,171.62, and did affix same to said containers.

IX.

That subsequent to the appointment and qualification of a Trustee in the Matter of the Bankruptcy of The Coast Wineries, Inc., said Trustee filed Objections to the three (3) Claims of the United States of America, as mentioned in Paragraph VI hereof, and thereafter said Objections came on for hearing before the Special Master, in the Matter of the Bankruptcy of The Coast Wineries, Inc., and pursuant to an agreement between the attorney for the plaintiff herein and the attorneys for the Trustee in Bankruptcy of The Coast Wineries, Inc., by which the Trustee withdrew its objections to the claims of the plaintiff for \$501.67 and \$76.20, respectively, as mentioned in Paragraph VI hereof, the Claim of the plaintiff for \$9,387.21 (which Claim included the tax claim sued upon herein) was withdrawn and written notice of such withdrawal given by the Collector of Internal Revenue for the Collection District of Washington to the Clerk of the District Court for the Eastern District of Washington, at Spokane, Washington, under date of October 15, 1935, filed in the Bankruptcy Proceedings of The Coast Wineries, Inc. on October 17, 1935, reading as follows: [46]

“Reference is made to our claim #2 filed under date of June 7, 1935 covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol

Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.”

and pursuant to such agreement and withdrawal the Special Master made his report to the District Judge, as follows:

“Claim No. Sixty-nine (69) filed by the United States Collector of Internal Revenue in the amount of Nine Thousand Three Hundred eighty-seven and 21/100 (\$9,387.21) Dollars has been withdrawn (Trustee’s Exhibit J).

This claim represented a tax on distilled spirits assessed under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934. The tax was abated under date of October 15, 1935.

“Claim No. Forty-six (46) in the amount of Seventy-six and 20/100 (\$76.20) Dollars was filed by the United States Collector of Internal Revenue as a proposed assessment of documentary stamp tax under Title 5; Part 3 of the Revenue Act of 1932. The certificates of stock upon which the stamp tax is claimed were issued by the corporation, and the tax thereon became due and payable. The trustee’s objection to this claim was withdrawn (Tr. Vol. I. p. 174).

“Claim No. Thirty-one (31) in the amount of Five Hundred One and 67/100 (\$501.67) Dollars was filed by the United States Col-

lector of Internal Revenue as a capital stock tax assessed under section 215 of the National Industrial Recovery Act. The Trustee's objection to this claim was withdrawn. (Tr. Vol. I, p. 174)."

and on December 21, 1936 the District Judge, J. Stanley Webster, confirmed said report of the Special Master by Memorandum Opinion.

X.

That thereafter, on April 15, 1937, the United States of America filed in the Matter of the Bankruptcy of The Coast Wineries, Inc., a claim in the sum of \$3,162.56, plus interest at one (1%) per cent for each full month from [47] March 1, 1935 to August 30, 1935, and one-half of one ($\frac{1}{2}$ 1%) per cent for each full month from August 30, 1935, to date paid, representing taxes claimed for the three months' period ending June 30, 1934, upon distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, said Claim being for a portion of the taxes covered by the previous Creditor's Claim of \$9,387.21 which had been withdrawn under the circumstances and pursuant to the agreement mentioned in the preceding paragraph hereof, and being the tax claim asserted in this action; and upon the objections of the Trustee in Bankruptcy of The Coast Wineries, Inc. to such claim, filed on April 15, 1937, said claim came on for hearing before the Honorable J. Stanley Webster, one of

the Judges of the United States District Court for the Eastern District of Washington, Southern Division, on October 5, 1937, and resulted in the entry of an Order on November 12, 1937, reading as follows:

“The above matter coming on regularly for hearing on the 5th day of October, 1937, on the claim of the United States of America covering taxes assessed under Section 3244 and 3126 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest, said claim having been filed by the acting collectors of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, and it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the Collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

“Now, Therefore, on oral motion of the trustee in bankruptcy, it is,

“Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed. [48]

“Dated this 12th day of November, 1937.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

“To all of which order the United States of America, Claimant, excepts, and said exception is hereby allowed.

J STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

Approved As To Form:

S. R. CLEGG,

Asst. U. S. Atty.

Approved As To Form:

CLARK & GRADY,

Attorneys for Trustee”

from which order no review or appeal was taken.

XI.

That on June 6, 1935 the plaintiff gave written notice to The Coast Wineries, Inc., and to the defendant, United States Fidelity and Guaranty Company of possible liability upon the bonds sued upon

herein, and in accordance therewith the defendant, United States Fidelity and Guaranty Company, gave similar written notice to the indemnitors upon its bonds, namely, N. J. Dolph, W. A. Hubbert and Maude Hubbert, his wife, and one McKenzie, but that thereafter, in reliance upon assurances given its Seattle Claim Superintendent, A. W. Murray, by representatives of the Alcohol Tax Unit in Seattle, Washington, that the taxes claimed by the plaintiff for which the defendant, United States Fidelity and Guaranty Company, might be liable upon its bonds had been abated and withdrawn; and upon the record in the Bankruptcy Proceedings of The Coast Wineries, Inc., showing the withdrawal of said tax claims, the defendant, United States Fidelity and Guaranty Company, refrained from filing a Creditor's Claim within the time allowed by law in the Estate of N. J. Dolph, Deceased, who died subsequent to the adjudication in bankruptcy of The Coast Wineries, Inc., and which said N. J. Dolph left a substantial estate from which such a claim could have been paid. Exception to plaintiff is allowed.

Done in Open Court this 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

[49]

And from the above and foregoing Findings of Fact the Court deduces the following:

CONCLUSIONS OF LAW.

I.

That the proceedings in the Matter of the Bankruptcy of The Coast Wineries, Inc., in Cause Number B-1959, in the District Court of the United States for the Eastern District of Washington, Southern Division, and in particular the Order of Judge J. Stanley Webster of November 12, 1937, are res judicata between plaintiff and defendant, United States Fidelity and Guaranty Company, upon the issues presented by this suit, and the action of the plaintiff to recover from the defendant, United States Fidelity and Guaranty Company, upon the tax claim asserted herein, is barred by the former adjudication, expunging and disallowing said claim.

II.

That the plaintiff is estopped to assert the claim sued upon herein as against the defendant, United States Fidelity and Guaranty Company.

III.

That this action should be dismissed with prejudice. Exception to plaintiff allowed.

Done in Open Court This 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

Prepared and presented by

ALLEN, FROUDE & HILEN &
HUBBERT & MULLINS,

Attys for Deft U S F & G Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 7, 1941. Millard P. Thomas, Clerk, By Truman Egger, Deputy. [50]

In the United States District Court for the
Western District of Washington,
Northern Division
No. 136.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE COAST WINERIES, INC., a corporation,
and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Defendants.

JUDGMENT.

This Cause having come regularly on for trial, before the undersigned Judge of the above entitled Court, on the 7th day of May, 1941, upon the Complaint of the plaintiff, the Amended Answer and Affirmative Defenses of the defendant, United States Fidelity and Guaranty Company, a corporation, and the Reply of the plaintiff thereto; and the plaintiff having appeared and having been represented by its attorneys, J. Charles Dennis, United States Attorney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special

Attorney for the Bureau of Internal Revenue; and the defendant, United States Fidelity and Guaranty Company, having appeared and having been represented by Allen, Froude & Hilen and Hubbert & Mullins, its attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, United States Fidelity and Guaranty Company, and exhibits having been introduced in evidence, and at the close of the trial the cause having been taken under advisement for the submission of briefs upon the facts, and such briefs having been submitted, and the Court on the 14th day of June, 1941 having filed its written decision herein; and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises: [51]

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the above and entitled action be, and the same is hereby, dismissed with prejudice.

Exception to plaintiff allowed.

Done in Open Court This 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

Prepared and presented by

ALLEN, FROUDE & HILEN

HUBBERT & MULLINS,

Attys for Deft U.S.F.&G. Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 7, 1941. Millard P. Thomas, Clerk, By Truman Egger, Deputy. [52]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of July, 1941.

J. CHARLES DENNIS

United States Attorney for
the District of Washington.

GERALD SHUCKLIN

Assistant United States Attorney
for the District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 6, 1941. Millard P. Thomas, Clerk,
By J. M. A., Deputy. [53]

In the United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

THE COAST WINERIES, INC., a corporation,
and the UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Appellee.

MOTION FOR EXTENSION OF TIME TO
FILE TRANSCRIPT OF RECORD AND
DOCKET CAUSE.

Comes now J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney for the District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, counsel for the appellant, and upon the affidavit hereto attached, move the Court for an order extending the time to file transcript of record and docket the above cause in the above-entitled Court to and including the 23rd day of February, 1942.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States Attorney

THOMAS R. WINTER

Special Ass't. to the Chief
Counsel

So Ordered:

CURTIS D. WILBUR

Senior United States

Circuit Judge

[Endorsed]: Order, Filed January 27, 1942. Paul P. O'Brien, Clerk. [54]

State of Washington

County of King—ss.

I, Thomas R. Winter, being first duly sworn on oath, deposes and says: That I am the Special Assistant to the Chief Counsel of the Bureau of Internal Revenue and as such assist the United States Attorney for the Western District of Washington in the trial of tax cases by or against the United States; that as such I actively assisted the United States in the trial of this case; that on October 4, 1941, the Attorney General's Office advised the United States Attorney that the Solicitor General had authorized an appeal in the above case, which letter was forwarded to my office and a notice of appeal was duly served and filed on October 6, 1941; that the United States Attorney was further requested to perfect the appeal and proceed with the printing of the record; that on account of additional duties due to the national emergency and through a misunderstanding between the United States Attorney's office and my office, the matter of filing the transcript of the record and docketing the case on appeal was not attended to within the

prescribed time; that affiant believes that the Government's counsel should be excused from this neglect and states that the failure to file the transcript of the record and docket the cause heretofore has not in any manner prejudiced the right of the appellee.

.....

Subscribed and sworn to before me this day
of, 1942.

.....

My commission expires:

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 4, 1942. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [55]

—————

[Title of District Court and Cause.]

ORDER

Upon motion of the United States of America, by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, one of its attorneys, and good cause being shown therefor, and it appearing necessary to transmit the original exhibits in the above case to the Circuit Court of Appeals, it is hereby

Ordered that the original exhibits in the above case be transmitted to the Circuit Court of Ap-

peals for the Ninth Circuit on the appeal of the above case.

Dated this 5th day of February, 1942.

LLOYD L. BLACK

Judge

Presented by:

THOMAS R. WINTER

Approved:

ALLEN, HILEN, FROUDE & HILEN

By GERALD DE GARMO

Attorneys for United States Fidelity
and Guaranty Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 5, 1942. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [56]

[Title of District Court and Cause.]

DESIGNATION OF CONTEXT OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court:

Please prepare and certify the complete record and all the evidence in the above action, including the complete transcript of testimony taken at the trial and all original exhibits which are designated as follows:

1. Complaint
2. Answer

3. Amended Answer
4. Plaintiff's Reply to Amended Answer
5. Memorandum Decision
6. Findings of Fact and Conclusions of Law
7. Judgment
8. Notice of Appeal
9. Motion and Order Extending Time to File
and Docket Record on Appeal
10. All original exhibits
11. Transcript of testimony taken at trial
12. Order transmitting original exhibits
13. This Designation.

Copy of the within received 2/4/42

ALLEN, HILEN, FROUDE
& DeGARMO

Attorneys for Appellee

Dated this 4th day of February, 1942.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States
Attorney

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Feb. 5, 1942. Millard P. Thomas, Clerk,
By C. R. Fitzgerald, Deputy. [57]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Western District of Wash.—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 57, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, except as to the Reporter's transcript of testimony, the original of which is enclosed herewith as part of the record on appeal in this cause, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit *Court of Appeals for the Ninth Circuit*.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the Plaintiff and Appellant for making record, cer-

[58]

tificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 153 folios at 05¢ (copies furnished).....	\$ 7.65
Appeal Fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record50
Certificate of Clerk to Original Exhibits50
<hr/>	
Total.....	\$13.65

I further certify that the foregoing fee in the amount of \$13.65 has not been paid for the reason that the Government is the Appellant.

I further certify that the original reporter's transcript of proceedings filed on Feb. 16, 1942 is also being forwarded as a part of the record on appeal in this case.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 18th day of February, 1942.

[Seal]

MILLARD P. THOMAS,
Clerk, United States District
Court for the Western Dis-
trict of Washington.

By: ELMO BELL

Deputy. [59]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Be It Remembered that heretofore, on to-wit, the 7th day of May, 1941, the same being one of the judicial days of the May Term of said court, this matter came on for hearing before the Honorable Jeremiah Neterer, one of the judges of said court, without a jury, whereupon the following proceedings were had and testimony taken in due form of law.

Appearances:

THOMAS R. WINTER, ESQ.,

Attorney for the Plaintiff.

ALLEN FROUDE & HILEN,

By GERALD DeGARMO, ESQ.,

Representing the Defendants. [*1]

The Court: You may proceed.

Mr. DeGarmo: If your Honor please, there are some matters in connection with this hearing concerning which we are not exactly in agreement on, but I think as the trial proceeds, we will be able to agree on many things; but it has occurred to me that it would be quicker to agree as the trial proceeds rather than to try to agree in advance.

Mr. Winter: If your Honor please, it may become necessary for me to appear as a witness in this case because of the proceeding before the Bank-

*Page numbering appearing at bottom of page of Original Reporter's Transcript.

ruptcy Court, and I will ask leave of the Court and of counsel to argue the case at its conclusion if I am to appear as a witness, also.

The Court: Is there any objection?

Mr. DeGarmo: None whatever.

The Court: Very well. You may argue, as well as testify.

Mr. Winter: If the Court please, I have prepared a trial brief which we think will be of assistance to the Court in the consideration of this case as the trial proceeds. If I may explain to the Court, this is a suit brought by the United States against the Coast Wineries, Inc., a corporation, and the United States Fidelity and Guaranty Company, a corporation. It is based upon an assessment levied and entered February 27, 1935, against the Coast Wineries for \$3,162.56 on approximately 10,000 gallons of wine—what we contend is wine, which was liable for tax, as a rectification tax. The law which is—

The Court: Take up the law afterwards.

Mr. Winter: Now, the plaintiff herein contends that there is due the United States this amount of tax under [2] this bond, the bond of which has been admitted the execution and the sufficiency of the bond having been admitted by the plaintiff. The defendant, by its answer, has admitted the first and second and third allegations. We have alleged that the Coast Wineries was a corporation organized and existing under the laws of the State of Wash-

ington, as set forth in the complaint. They admit it is a corporation, apparently making some point of the fact that on, I think it was, June 19, 1935. It has admitted by counsel that it was a corporation doing business and manufacturing and selling wine up until June 17, 1935, when it was adjudicated a bankrupt and its operation ceased, and was operated by the predecessor in the liquidation proceeding.

The Court: It did not affect its corporate existence, but it did affect its business.

Mr. Winter: Our contention is that all of the tax was incurred, by which the bonding company, surety, would become liable under this bond. This is in the nature of a suit in law on a bond, and we expect to show that the defendant bonding company is liable for this amount of money.

We will call Mr. Carlton.

Mr. DeGarmo: I would prefer to make our statement now so that your Honor will have all positions clearly before you. The chief defense of the defendant in this case, the principal defendant, the United States Fidelity and Guaranty Company, is based upon matters of record which appear in the matter of the bankruptcy of the Coast Wineries. Our principal defense being that it is *res judicata* and also estoppel created by the actions of the government and its agents in the Coast Wineries bankruptcy. It appears from the record in the [3] Coast Wineries, and we have the files brought over here so that they are now in court, that the government came in to the bankruptcy proceeding, or in the

reorganization proceeding, and filed three creditors' claims, each for a large amount of cost in the sum of \$9,000, and it is admitted that there was included \$3,162.56 which is now being admitted to be collected from the defendant, United States Fidelity and Guaranty Company.

There was a second claim which was for capital stock liability, and the third tax, which was for some tax liability. After the adjudication in bankruptcy of the Coast Wineries, the trustee filed exceptions, or objections, to those three claims, the claim for the \$9,000 tax, which included the tax, and the matter came on for a hearing before the trustee, and the record shows that on the 18th day of June, 1935, a letter was filed with the clerk of the court, signed by the Collector of Internal Revenue at Tacoma, in which he states that his claim for \$9,000, which includes the tax due, had been paid by the Federal Government, and that they were withdrawing the claim.

The trustee, or special master, who was hearing that matter, then made his recommendation to Judge Webster in Spokane, and in this recommendation was a report that this particular claim had been withdrawn, the tax having been paid, and subsequently Judge Webster entered a memorandum opinion which is in the files and will be introduced, in which he approves the recommendations of the special master. That was entered in 1935, I believe.

Some two years later, in 1937, the government came into the bankruptcy proceedings against the Coast Wineries and [4] filed a separate creditors' claim for the three thousand one hundred fifty-six dollars and some cents tax, which they are now attempting to collect here. The trustee made oral objection to that claim before Judge Webster, and Judge Webster on, I think, the 12th day of October, 1937,—

The Court: November.

Mr. DeGarmo: It is November, that is right. The hearing was on the 5th of November, and on the 12th of November, Judge Webster entered his order stating that the claim was disallowed and expunged. Now, that was the identical tax for which they now sue the United States Fidelity and Guaranty Company, and it is our position that that order entered in the Bankruptcy Court was in adjudication of the liability of the principal, with this tax, which they are now attempting to collect from the surety, and that the surety was discharged by the operation of that order, the same as the principal, and for that reason the defense is *res judicata* based on that order, and that the order pleaded the defense of estoppel, based upon our position; that when it appeared that the government was going to collect some \$6,000 or \$7,000 in tax upon the liquor on which this rectifying tax was claimed to have been due, the government agreed to the withdrawal of the original claim for \$9,000, which included the \$3,156 claimed and sued on herein.

That notice reached the surety company of the fact that the government had agreed to abate that claim, and that they were not looking to the surety, who would look only to the bankruptcy proceedings, and in reliance on that and in reliance upon a letter from the collector, the surety did not prosecute the claims which it had against the indemnitors under this bond, only [5] against Mr. N. J. Dolph and only one against Mr. W. A. Hubbert, who is associate counsel in this case, an attorney of Yakima, and that we also refrained from paying that tax, which we have a right to do, and filed a subrogation claim in the bankruptcy proceeding in order to obtain our property and assets in the bankruptcy proceeding. Now, we refrained from doing that, and in reliance of the government's representation that that tax was paid and that there would be no liability on our bond, and about two years subsequently, the government came up and asserted this claim against us. In the meantime, Mr. Dolph had died and his estate had been probated, and the time for filing the claim had expired, and we lost that right of indemnity against him or his estate, and we lost any right for a claim in the bankruptcy proceeding, and we claim that that is not an estoppel for remedying the past, which they took in a court of record, stating that the tax had been abated, and they cannot now assert that claim against us.

There is a third claim for a set-off, upon which there seems to be some dispute of the facts. We

claim that the government entered into possession of some \$700 which should apply to the bankruptcy subsequent to its adjudication, and that it was supposed to have, or should, under the ruling of the trustee as surety, have retained that money and applied it to the payment for taxes, and that having done so, we are entitled to have any judgment as entered, as a set-off to that amount. That is, I think, what constitutes our defense which will be asserted by the defendant.

The Court: Is it conceded that the revenue stamps were ordered purchased by Judge Webster, in the bankruptcy [6] proceeding?

Mr. DeGarmo: I think that has to be conceded, from the record.

The Court: If that is conceded, that claim will have to be paid.

Mr. DeGarmo: I think that is probably true. We do not wish to waive that claim, because we feel that there is some merit to it; but I appreciate—I think the record establishes that the stamps were purchased by the trustee pursuant to direction of Judge Webster, to be placed upon this liquor which was sold, upon which the government claims some \$6,700 in taxes.

The Court: If that is admitted, then I do not think much time need be devoted to that particular issue, because if the stamps were purchased by the trustee, that under the order of Judge Webster they were purchased out of the assets of the estate. Of course, the assets were not depleted in any way.

You may proceed.

Mr. Winter: We will call Mr. Charlton.

The Court: Let me make another inquiry. I gather from the pleadings that the taxes sought to be recovered were levied. Is there any dispute about that?

Mr. DeGarmo: There is no dispute on my part that the government originally made an assessment,—a telegraphic assessment, of these taxes. I would wish to object to the introduction of any evidence of assessment on the ground that the record shows that in the bankruptcy proceeding an abatement of those taxes and that, therefore, the matter of assessment is not material in this case. [7]

Mr. Winter: Of course, our contention is that the bankruptcy proceeding does not show an abatement.

The Court: I assume it is admitted that the assessment levied was properly made, and the issue herein is upon the abatement afterward?

Mr. DeGarmo: That is correct. I do not deny that there was an assessment made, but I object to any evidence or testimony in this case upon the ground that the record shows an abatement of taxes which the government cannot deny, because it is a matter of record.

The Court: You would have to have the assessment in order to have the abatement.

Mr. DeGarmo: That is correct.

The Court: They say, if it was admitted, that the assessment was duly made and the defense

urged against that assessment is abated, then there would be no claim upon the assessment and we would be right back to the beginning.

Mr. Winter: For the purpose of the record, your Honor, I will offer in evidence a certified photostatic copy of notice of adjustment of claim for abatement, and other documents attached thereto. I will ask, if your Honor please, that these be marked for identification.

(The documents referred to were marked for identification as "Plaintiff's Exhibit No. 1.")

Mr. Winter: We will offer in evidence, if the Court please, a certified photostatic copy of the assessment, certified by the assistant clerk of the treasury. There is attached to the certificate three papers which we are not asking to be admitted at this time.

The Court: Don't you think the admission is as [8] strong as your certificate?

Mr. Winter: I think this will be of information to the Court in understanding the other exhibits that will be introduced later on in this case, if your Honor please.

The Court: Let it go in.

(The documents previously marked as "Plaintiff's Exhibit No. 1" for identification were received in evidence.)

Mr. Winter: Is it also admitted that notice and demand was made upon the Coast Wineries for assessment of taxes on March 1, 1935, as alleged?

Mr. DeGarmo: It may be so admitted.

Mr. Winter: The next we will offer is a letter dated June 6, 1935, addressed to the United States Fidelity and Guaranty Company.

Mr. DeGarmo: We have the original of that, and we do not object to your introducing it.

Mr. Winter: We will offer in evidence a copy of the letter dated June 6, 1935.

The Court: There is no objection to its being a copy, as I understand?

Mr. DeGarmo: No.

The Court: Admitted.

(The document above referred to was marked "Plaintiff's Exhibit No. 2" and received in evidence.)

Mr. Winter: Now, if your Honor please, we would like to offer in evidence, and we will offer in evidence the original bond, for the purpose of the record.

Mr. DeGarmo: There is no objection.

The Court: Admitted. [9]

(The document above referred to was marked "Plaintiff's Exhibit No. 3" and received in evidence.)

Mr. Winter: Do you have the original bond?

Mr. Charlton: Yes.

Mr. Winter: May that be marked as government's exhibit?

The Court: Is that a part of the files of the bankruptcy proceedings in Spokane?

Mr. Winter: No, your Honor.

The Court: Very well.

Mr. Winter: Now, if the Court please, attached to "Plaintiff's Exhibit No. 1" is a certified photostatic copy of the trustee and bankruptcy's claim for abatement, filed September 19, 1935, a certified copy of the assessments as abated, and a notice of claim for abatement.

Mr. DeGarmo: I do not object to the introduction in evidence of the claim of the trustee in bankruptcy for abatement of the tax. I do object to the introduction in evidence of the notice from the Commissioner of Internal Revenue as to the abatement of a portion of the tax, upon the ground that in so far as this proceeding is concerned, they must be bound by the record of the bankruptcy proceeding to which they made themselves a party by filing the proof of claim and participating in the hearing and—

Mr. Winter: I might say, your Honor, that our proof of the abatement may be immaterial at this time. However, in the interest of saving time, we admit that the \$3,162.65 has not been paid either by the Coast Wineries or by the bonding company, and it may have been abated or might have been res judicata under that terminology. [10]

Mr. DeGarmo: That is correct.

The Court: The ruling is reversed on the admission of counsel.

Mr. Winter: I think that is the government's case, your Honor.

The Court: Do you want to cross-examine?

Mr. DeGarmo: No questions.

The Court: Proceed with the defense.

Mr. DeGarmo: I would like to call Judge Grady to the stand.

THOMAS E. GRADY

was called as a witness for and on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. Thomas E. Grady.

Q. Where do you reside, Judge?

A. Yakima.

Q. What is your occupation or profession?

A. An attorney.

Q. How long have you been practicing that profession? A. Thirty-six years.

Q. And has that been continuously in and around Yakima? A. Yes.

Q. Judge Grady, in 1935, did you act as attorney for the trustee in bankruptcy of the Coast Wineries, Inc.?

A. The firm of Clark & Grady did. [11]

Mr. Winter: Now, if the Court please, in order that we may make a record, we want to skip to the next question.

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: I think maybe I can eliminate—

The Court: Take up the next question. We will cross the bridge when we reach the stream.

Mr. Winter: Very well.

By Mr. DeGarmo:

Q. At this time, who was the trustee in bankruptcy?

A. Yakima Valley Bank & Trust Company.

Mr. DeGarmo: There are a number of papers here attached to the files that we want to introduce in evidence as a part of our case. I have had copies made so that we may substitute copies for the originals.

The Court: Have you submitted the copies to the other side?

Mr. DeGarmo: Yes. Mr. Winter has had copies of these for some time.

I would like to offer at this time from the files in the matter of Coast Wineries, Inc., debtor, No. B-1959, in the District Court of the United States for the Eastern District of Washington, Southern Division, three creditors claims filed by Alex McK. Vierhus, Collector of Internal Revenue, for taxes, and those claims appear in the claim file, which is Claim No. 1. I ask permission to substitute copies for the originals, which are in the file.

The Court: As one exhibit?

Mr. DeGarmo: No, I would like to have them filed as three exhibits.

(Testimony of Thomas E. Grady.)

The Court: What will be the number? [12]

The Clerk: Defendant's A-1, A-2, and A-3.

Mr. DeGarmo: A-1 being a claim for nine thousand and some dollars for tax, plus interest of 1% from March 1, 1935, to date paid, which has been introduced as a part of the government's case.

No. 2 is a claim for \$501.67, being the capital stock tax.

Exhibit A-3 being a claim for \$76.20, as a documentary stamp tax.

Mr. Winter: If the Court please, we object to the introduction of these claims, as being incompetent, irrelevant and immaterial. First, the claim, Defendant's A-2, is apparently a claim filed to cover—it was a liability which was incurred, and we do not think it should be accepted as a part of the defendant's case in this action. It has no bearing on this case.

The same thing is true of Defendant's Exhibit A-3.

With respect to Defendant's Exhibit A-1, we object to that as being irrelevant and immaterial, on the ground, first, that it was not necessary for the government to allege it as a part of the claim in the Bankruptcy Court, and it has no bearing in this case, and is no evidence, and should not be received.

Further, I do not think it should be withdrawn from the file.

(Testimony of Thomas E. Grady.)

The Court: I will reserve the ruling.

By Mr. DeGarmo:

Q. Judge Grady, as counsel for the trustee in the matter of Coast Wineries, Inc., at that time did you have occasion to examine three claims which were filed by the United States [13] Government for taxes? A. I did.

Q. What action was taken on those claims by the trustee?

Mr. Winter: Now, if the Court please, we object to any evidence as to what the trustee did.

Mr. DeGarmo: I will introduce in evidence the record. This is merely preliminary.

Mr. Winter: And, furthermore, it is irrelevant and immaterial what the trustee did with the claims. What are you having marked?

Mr. DeGarmo: I have not had anything marked as yet. I am going to.

By Mr. DeGarmo:

Q. Judge Grady, were objections filed by the trustee, to this claim for nine thousand some odd dollars—\$9,387.21? A. Yes.

Mr. Winter: The same objection, your Honor, as incompetent, irrelevant, and immaterial.

The Court: He may answer.

A. Yes.

Mr. DeGarmo: I will have marked as Defendant's Exhibit A-4, a statement of objections by the trustee, being a copy of the original which appears

(Testimony of Thomas E. Grady.)

in the matter of the files of the Coast Wineries, Inc.

The Court: As Exhibit A-4?

Mr. DeGarmo: It is a statement of objections.

The Court: Those are objections?

Mr. DeGarmo: To the claim of the United States Government; that is, the claim, A-1. We offer that document in evidence in lieu of the original, which is in the files [14] of the court.

Mr. Winter: The same objection, your Honor.

The Court: There is no objection because it is a copy?

Mr. Winter: No, your Honor.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's A-5, a motion of the United States of America, directed against the objections of the trustee.

(The document above referred to was marked "Defendant's Exhibit No. A-5" for identification.)

Mr. DeGarmo: I now offer in evidence "Defendant's Exhibit A-5," which is the motion of the United States against the objections of the trustee.

Mr. Winter: The same objection, your Honor.

The Court: The same ruling.

Mr. DeGarmo: I now wish to have marked as Exhibit A-6, a notice which was given by the referee in bankruptcy, by the Special Master in the

(Testimony of Thomas E. Grady.)

matter of the bankruptcy of the Coast Wineries, Inc., in the matter of the reorganization proceedings of Coast Wineries, Inc., of hearing upon a number of matters, including the amount, validity, and priority of the claim of the United States, which involved these taxes.

The Court: That is a notice of the referee?

Mr. DeGarmo: This is a notice of hearing before the master upon these claims. Here is a number of claims, including the claims of the United States, and I offer these in evidence as Defendant's Exhibit A-6.

Mr. Winter: We object to that, if your Honor please, upon the ground that it has not been shown that the plaintiff, [15] the United States of America, had any notice, or that such a notice was served upon it.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-7, a copy of the letter from the Collector of Internal Revenue at Tacoma, with reference to this claim A-1.

The Court: What do you call it?

Mr. DeGarmo: It is a letter from the Collector of Internal Revenue at Tacoma, with reference to Exhibit A-1, being a letter which counsel, in the answer, has admitted was sent, in which the collector advised the withdrawal of this claim.

The Court: Is that the letter referred to in Judge Webster's orders?

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: That is correct.

Mr. Winter: We object to it as incompetent, irrelevant, and immaterial as to any action taken by the collector.

The Court: Ruling reserved.

Mr. Winter: I object upon the further ground that it was not directed to any party in these proceedings, but to the Clerk of the District Court of the United States for the Eastern District of Washington.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-8, three paragraphs from the Special Master's report and recommendation. These three paragraphs are a report of the Special Master with reference to three claims introduced here as A-1, A-2, and A-3. [16]

The Court: Is there any objection, Mr. Winter, to the reception of this report?

Mr. Winter: No objection to that but, your Honor, I think the whole document ought to be introduced in evidence. I have not had an opportunity to examine these; I have never seen them.

Mr. DeGarmo: I am perfectly willing that counsel look through these, if he so wishes.

Mr. Winter: I object to it on the ground stated.

The Court: The ruling on this is reserved. As I understand, you are making the same objection?

Mr. Winter: Yes, your Honor.

(Testimony of Thomas E. Grady.)

The Court: The objection is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-9, a memorandum opinion by Judge Webster's ruling on the special master's report.

Mr. Winter: Was that furnished to me?

Mr. DeGarmo: Yes.

The Court: It is likewise referred to in his order?

Mr. DeGarmo: That is correct. These are the same things referred to in his order.

Mr. Winter: The same objection.

The Court: The ruling is reserved.

Mr. DeGarmo: Then I now wish to have marked as Defendant's Exhibit A-10—wait a minute. There is one before that. As Exhibit A-10, proof of claim, which was filed in the bankruptcy proceeding by the United States for this \$3,156 tax, which is now sought to be collected from the defendants in this case.

Mr. Winter: The same objection, your Honor.

[17]

The Court: The same ruling—reserved.

Mr. DeGarmo: And as Defendant's Exhibit A-11, the order by Judge Webster of November 12, 1937. I offer Defendant's 11 in evidence.

The Court: That is the order of November 12?

Mr. Winter: It is the order expunging the claim. The same objection, your Honor.

(Testimony of Thomas E. Grady.)

The Court: The same ruling—reserved.

By Mr. DeGarmo:

Q. Judge Grady, in connection with your duties as attorney for the trustee in the matter of the reorganization of Coast Wineries, Inc., and later as a bankrupt, did you have any conversations or dealings with a man by the name of Thomas Winter, who is now in the court room?

A. I did.

Q. In connection with the filing of these three claims? A. Yes.

Q. Is Mr. Thomas Winter the special attorney for the Collector of Internal Revenue?

A. Yes.

Q. And who appears of record as an attorney in this case? A. Yes.

Q. In connection with the three claims which were filed by the United States Government and which have been referred to here as Defendant's Exhibits A-1, A-2, and A-3, and the objections which were filed to those claims by the trustee, and the government's objections to those objections, did you have a conference or conversation with Mr. Winter? A. I did.

Q. Where did that take place; that is, in what city, Judge [18] Grady? A. Yakima.

Q. And when was that conversation with reference to the time that the wine had been ordered sold by Judge Webster? Was it before or after?

(Testimony of Thomas E. Grady.)

A. Afterwards.

Q. After the wine had been ordered sold by Judge Webster? A. Yes.

The Court: But before the sale?

Mr. DeGarmo: No, I think after the sale.

The Witness: It was during the time we were having the hearing on the master's report, or the hearing before the master.

By Mr. DeGarmo:

Q. That was after the sale, I believe?

A. Yes.

Q. Now, will you relate what that conversation was as it related to these three claims?

Mr. Winter: Now, if the Court please, we object to that as irrelevant and immaterial, and that any statements that he may have made to the trustee, or to the trustee's attorney, cannot bind the United States. Even if we had entered into some agreement, it would be irrelevant and immaterial and would have absolutely no bearing on the issues in this case.

The Court: I will let it go in the record. It may become material later on.

A. The three claims which have been mentioned here were under discussion between Mr. Winter and myself at the time of the hearing being held before the master, and Mr. Winter [19] told me that the government would withdraw the large claim of nine thousand and some odd dollars if the trustee would

(Testimony of Thomas E. Grady.)

approve and recommend for approval the other two claims.

The Court: What claims?

The Witness: The other two claims, the one for five hundred and some odd dollars, and one for seventy some odd dollars.

The Court: \$70?

The Witness: Yes.

By Mr. DeGarmo:

Q. It was an agreement to that effect on your part? A. It was.

Mr. Winter: I object to that as a conclusion.

The Court: What did you say with relation to that?

The Witness: I told Mr. Winter that I would recommend to the trustee that if the large claim was withdrawn that these other two claims be allowed, or recommended for allowance, rather.

The Court: Was that done?

The Witness: That was done.

By Mr. DeGarmo:

Q. And subsequently the trustee filed a claim for abatement of this \$9,000 tax?

A. Yes, sir. As I recall, there was some discussion about the advisability of clearing the government's record, and that the trustee should file a claim for abatement, which was done.

Q. As I understand it, the trustee did recommend the allowance of the two smaller claims upon the understanding with Mr. Winter? [20]

(Testimony of Thomas E. Grady.)

A. It did.

Q. Did you subsequently receive, Mr. Grady, a letter from the Collector of Internal Revenue concerning this tax, or did that letter come to the clerk of the court, to your knowledge?

A. It came to the clerk of the court.

Q. You are referring now to Defendant's Exhibit A-7? A. Yes.

Mr. DeGarmo: I think that already shows on the record, if your Honor please, in Defendant's A-8, which is the excerpt from the report of the special master.

The Court: Yes.

Mr. DeGarmo: There were two claims, one for \$76.20, and one for \$501.67, and they were confirmed by Judge Webster's memorandum opinion, which is the document, A-9, and the two claims were approved and allowed by the Court and by the special master.

By Mr. DeGarmo:

Q. Judge Grady, after the order of the court, which has been referred to, directing the sale of the wine, do you recall the amount that was received for the wine, upon sale?

A. \$12,000, and an extra \$500 was owing from another source.

Q. So that there was a total of \$12,500 received?

A. And what was the ultimate provision that was made for payment of the tax out of that to the government—out of that money?

(Testimony of Thomas E. Grady.)

Mr. Winter: If the Court please, the order of the court is the best evidence of what was done.

Mr. DeGarmo: I have no objection to the order of the court being used. [21]

Mr. Winter: Has that been introduced?

Mr. DeGarmo: Not yet. I don't have a copy of it.

Mr. Winter: It is in the record.

Mr. DeGarmo: I will have to make a copy of that order, and I will not use it at this time.

By Mr. DeGarmo:

Q. Just one thing further, Judge Grady. Are you familiar with the fact as to whether or not there was sufficient ultimately realized in the bankruptcy of the Coast Wineries, Inc., with which to pay any of the claims of creditors, or claims of the trustee, or his attorney, or any of the tax claims of the United States?

A. Yes. I remember——

Q. Was there any such amount received?

A. No, it was not sufficient to go beyond certain preferred claims.

Q. And of the amount which was realized from the sale of the wine to Mr. Rovig, was any amount of that paid to the government for taxes?

A. Yes.

Q. Do you know the amount of that?

A. I do not know the exact figure; it was somewhere around between \$6,000 and \$7,000.

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: I think that is all. You may examine.

Cross Examination

By Mr. Winter:

Q. As I understand it, Judge Grady, the assets in the estate of the Coast Wineries were insufficient to pay the preferred claims, with the exception of this \$6,000 which was ordered by Judge Webster in his order of September 19? Do you recall [22] that order?

A. I do recall that, Mr. Winter; that is correct.

Mr. Winter: We ask that the order be marked and introduced in evidence as a part of the cross-examination. It will be found in the file. Shall we find it now, your Honor?

The Court: Is there any objection?

Mr. DeGarmo: No.

The Court: I think it ought to go in.

Mr. DeGarmo: It is a part of the files.

The Court: I think a copy of it should be made and substitute a copy, so that these papers can be returned.

Mr. Winter: That will be Exhibit 5?

By Mr. Winter:

Q. Then, I take it that this \$7,000 claim, which was subsequently attempted to be filed, and oral objection to its allowance, if it had been allowed, it could not have been put in that estate; is that correct? A. That is my opinion.

(Testimony of Thomas E. Grady.)

Q. And that was the opinion of the trustee?

A. Yes.

Q. With respect to the conference you say you had with me, you do not contend, Judge Grady, that you would withdraw your objections to those three claims, because we discussed the possibility of abating the tax covered by the \$9,000 claim, do you?

A. Yes, I do, Mr. Winter.

Q. You seriously contend it?

A. Yes, I do.

Q. Do you contend that I ever stated to you that I would [23] abate the claim?

A. You said the government would withdraw the claim.

Q. Didn't I tell you, Judge Grady, that I would recommend the abatement of it, or withdraw that claim?

A. You might have used that word, but the impression——

Q. All right.

The Court: Let him finish the answer.

A. (Resumed) But the impression you left with me, and upon which I acted, was that you were going to see that the claim was withdrawn by the Department.

By Mr. Winter:

Q. Do you have any valid objection to the capital stock tax claim or the other claim?

A. Yes.

(Testimony of Thomas E. Grady.)

Q. What?

A. It was assessed, as I recall, under the N. R. A., and that had been declared unconstitutional.

Q. Isn't it possible that that was an error?

A. No. I followed the decisions on that.

Q. What was your objection to that third claim? A. The same reason.

Q. When did you say you had that conference with me, and where it occurred?

A. That was, as I recall, at the first meeting on these claims before Mr. Clark, the Special Master.

Q. When did that occur?

A. I could not give you the date. I would have to refer to the letter.

Q. Will you refer to the record?

A. If you will show me when the first hearing was had. [24]

Q. You were the attorney for the trustee, weren't you?

A. Yes, but I cannot recall those dates.

(The witness referred to some papers.)

Q. Was it on September 18, 1935?

A. I would think so. I know that would be my best recollection that our conversation occurred just prior to what transpired in this record.

The Court: How long before?

The Witness: Just shortly before that.

(Testimony of Thomas E. Grady.)

By Mr. Winter:

Q. Do you recall, Judge Grady, or do you know that you and I had a conference with respect to this claim on \$9,000, and you did not talk a work about the claim for \$500, or the \$700?

A. That is not my recollection, Mr. Winter.

Q. Do you recall that you were insisting that the government's claim for the \$9,000 should attach to the proceeds of the sale after the payment of the costs of administration?

A. Not that claim.

Q. What claim?

A. The claim that we had reference to was the claim with reference to paying the stamp tax.

Q. And you made no objection to the trustee with respect to the allowance of the claim of the \$700 and the \$500—I mean the \$500 and the \$76?

A. I did.

Q. Was that recommendation in writing?

A. No.

Q. When did you file a claim for the abatement of the tax?

A. It was sometime later; I haven't the date in mind. If you can show me the copy, I will recall, I think. [25]

Q. It was the 18th day of September, 1935; is that right?

A. Whatever the record shows there, Mr. Winter, I would accept.

(Testimony of Thomas E. Grady.)

Q. (Counsel handing a paper to the witness).

A. Yes.

Q. The claim for abatement was later allowed for \$6,000—Do you have it there? It was allowed for \$6,224.65; is that right?

Mr. DeGarmo: I wish again to preserve our objection to that allowance for abatement by the Commissioner, on the ground that the government is bound by the record in the bankruptcy proceeding.

The Witness: That appears to be the record.

By Mr. Winter:

Q. You knew and then agreed that I could not withdraw the claim of my own order, didn't you?

A. You knew that I, as well as any other attorney, in stipulating——

Q. In stipulating. Do you mean to tell this Court, Judge Grady, that you and I stipulated that if I would recommend the abatement of this claim to this court that you would allow the other claims and that that was the consideration for it?

A. Yes, exactly.

Q. You knew that I could not abate the claim or withdraw it, didn't you, excepting to recommend it?

A. I know that you could by recommending it, and if that offer was accepted or forwarded——

Q. Didn't I say that it would take fifty days to recommend——

(Testimony of Thomas E. Grady.)

A. (Interposing) I don't know anything about that. [26]

Q. And then you would proceed to prepare your claims for abatement at that time?

A. I don't remember about that part of it.

Q. Then you thought I could abate it and suggested that you draw up a petition to abate it?

A. You requested it to clear the record.

Q. I requested that you make a claim for abatement, didn't I? A. Yes.

Q. And you said it was not to be made?

A. Yes, of course.

Q. Isn't that right? A. Yes.

Q. And then you say, Judge Grady, that it was an expression of mine saying that you recommend that and you agreed to allow the other claims?

A. Yes.

Q. Were the other claims ever allowed and paid?

A. They were allowed but not paid.

Q. You knew that there was not sufficient funds to pay them, didn't you? A. No.

Q. And the assets had been sold by April, 1935?

A. I think September, 1939.

Q. But the wine had been disposed of?

A. It was sold, yes.

Q. You had spent \$6,224 in stamps?

A. Yes.

Q. You had \$6,000, didn't you?

A. There were the containers and some equip-

(Testimony of Thomas E. Grady.)

ment that was [27] covered by the Consolidated Holding Company.

Q. And you filed a claim for refund for the \$6,000 with the trustee, didn't you? A. Yes.

Q. And you knew about the objections that were referred to the trustee? A. Yes.

Q. You were the attorney for Mr. Dolph, weren't you? A. No.

Q. Were you the attorney for the bankrupt before it went into bankruptcy?

A. No, just a trustee.

Q. The bank? A. Yes.

Q. And you felt that in some way this could be gotten out of the estate? Of course, you haven't realized that that enured to the benefit of the defendant, the United States Fidelity and Guaranty Company.

A. I had taken no interest in that.

Q. You have taken no interest in that?

A. No.

Q. To whom did you make the recommendation about withdrawing the objections to the claim?

A. Mr. Moe, acting trustee for the bank.

Q. Do you know Mr. Moe's signature?

A. Yes.

Q. And this so-called agreement that you say you had with me to withdraw your objection to the claims, if I would abate the tax, you say that occurred about the time of the hearing on the special master's report? [28]

(Testimony of Thomas E. Grady.)

A. That is my best recollection as to the time.

Q. Don't you recall that prior to that time the hearing had been continued because no action had been taken on the claim, and it was not known what the amount of taxes would be made under Judge Webster's order, and that was the reason the claim was withdrawn?

A. No, that is not my recollection.

Q. Did you prepare the claim for refund for the trustee?

A. I do not recall whether I prepared it or whether Mr. Moe prepared it. Maybe we both prepared it in conjunction with each other.

Q. In other words, you notarized it as notary public, is that correct? A. That is correct.

Q. You were familiar with the claim for refund, were you not? A. I think so, yes.

Q. You didn't see anything in the claim for refund that could be abated because you had allowed some other claim, did you?

A. No. We followed the form that is used by the Department.

Q. Well, just read to the Court what you said in that (counsel handing a paper to the witness).

Mr. DeGarmo: He does not need to read it.

Mr. Winter: We will offer it in evidence.

The Court: Very well, it may go in evidence.

By Mr. Winter:

Q. Now, the basis for your abatement was that

(Testimony of Thomas E. Grady.)

your claim for \$3,000 covered the rectification tax——

Mr. DeGarmo: If your Honor please, I submit that [29] that is in the record and that it will speak for itself.

The Court: It speaks for itself, of course.

By Mr. Winter:

Q. Now, Judge Grady, I think you testified that the government filed a claim for \$9,000 with the trustee. As a matter of fact, that was—the claim here referred to was filed with the trustee in the reorganization proceeding; isn't that correct?

A. I think that is correct, Mr. Winter, yes.

Q. And subsequent thereto, there was an order entered by the Court authorizing the trustee to sell all the assets, subject to liens?

A. Free from the liens.

Q. I mean the first order. Didn't you procure an order of the Court authorizing the trustee to sell; isn't that right?

A. I do not recall that first order, Mr. Winter. If you will refresh my recollection——

Mr. Winter: Do you have it there, the order of the court?

The Court: What is the letter that you are referring to, Mr. Winter?

The Witness: I think what Mr. Winter is referring to is the claim which I notarized.

Mr. Winter: Yes, the claim for abatement.

(Testimony of Thomas E. Grady.)

By Mr. Winter:

Q. Now, in the bankruptcy proceeding, there was a petition filed for relief under Section 77-B of the Bankruptcy Act? A. Yes.

Q. And you were appointed attorney for the debtor as trustee at that time? [30]

A. The trustee was appointed and then he was authorized to engage his counsel.

Q. And then, on about June 16, the Coast Wineries, Inc. was adjudicated a bankrupt?

A. Yes.

Q. In 1935——

A. After the reorganization failed.

Q. After the reorganization failed?

A. Yes.

Q. The reorganization proceedings were filed on February 9, 1935, and were continued from time to time until June 16, when a trustee in bankruptcy was appointed? A. Yes.

Q. And on June 16, Exhibit A-1 was filed with the trustee? A. I believe so.

Q. As trustee of the debtor corporation?

A. I think the record so shows, yes.

Q. And on June 17, an order directing liquidation of the assets of the debtor was entered by Judge Webster? That is the date, isn't it?

A. I think that is correct.

Q. I will show you this paper and ask you if it is not a fact that you filed a petition on the same

(Testimony of Thomas E. Grady.)

day—you filed a petition for the sale of the property. A. Yes.

Q. And you drew that as attorney?

A. Correct.

Q. An order directing the sale of the property was entered on the same day? That is Judge Webster's signature, isn't it? [31]

A. That is Judge Webster's signature.

Q. And on the same day there was an order entered appointing appraisers? A. Yes.

Q. Order directing notice to creditors of the bankrupt? A. Correct.

Q. On the 26th day of June, 1935, there was a notice of the sale of the property, by private sale, pursuant to that order authorizing you to sell the property? A. Yes.

Q. And you filed an affidavit opposing the notice, and then, on June 26, 1935, it was to be held for the private sale, and notice was issued revoking the previous order of sale?

A. Not the previous order; the previous plan of sale.

Q. The previous plan of sale?

A. Yes. Do you wish me to explain?

Q. I wish you would explain to the Court just what happened with reference to the plan of sale.

A. A party by the name of Lustig had been negotiating to buy this wine for the purpose of distilling it, and it was felt that if that plan was

(Testimony of Thomas E. Grady.)

carried out, the stamp tax for which the government was contending might not be collectable, but a distilling tax in its place, and the trustees thought it would be better for us to sell to Mr. Lustig than to Mr. Rovig, but when it was taken up before Judge Webster, the Judge held that the trustee must follow the order of sale, and the Lustig deal then was abandoned and Mr. Rovig's bid was accepted.

Q. And the sale was confirmed on June 27, 1935, by Judge [32] Webster? A. Yes.

Q. All right. Subsequent to that time, isn't it a fact that Mr. Rovig, the purchaser, filed a petition with the Court asking to have that sale cancelled and set aside, or in the alternative, that the trustee be directed to pay the tax on the wine?

A. Such a petition was filed.

Q. And there was a hearing held before Judge Webster? A. A hearing was held.

Q. And after that hearing, Judge Webster, on September 16, 1935,—pursuant to this order the trustee purchased stamps in some \$6,000; isn't that right?

A. It was approximately that amount.

Q. Well, it was the amount which was later abated, according to this exhibit, Plaintiff's Exhibit No. 1?

Mr. DeGarmo: I think that is a fact, Mr. Winter.

(Testimony of Thomas E. Grady.)

Mr. Winter: It was the amount that the Court required us to purchase.

Mr. DeGarmo: The record will disclose definitely what it was.

By Mr. Winter:

Q. So that there will be no doubt about it, can you turn to your petition which is filed with the court for discharge—for settlement and discharge and see the amount which was expended by the trustee? A. If you have the file there.

Q. I don't think that is so important, but in any event, Judge Grady, it was approximately \$6,000 in stamps that the trustee purchased in accordance with this order of September, [33] 1935, of Judge Webster? A. That is correct, yes.

Q. And subsequent to that time or, rather, you acknowledged, as notary public, and the trustee filed his claim for abatement of the tax?

A. Yes.

Q. You set forth in there, of course, that you had purchased these stamps necessary, in accordance with the Court's order? A. Yes.

Q. As a matter of fact, you filed a claim—I mean you entered a claim for refund for the additional amount which you had purchased in excess of the amount of the order in the sum of \$735.22?

A. Yes.

Q. And that \$735.22 was turned in and you received a refund on those stamps?

A. Correct.

(Testimony of Thomas E. Grady.)

Q. And those stamps were all purchased out of the \$12,000 which was received from Mr. Rovig for the wine which you sold under the order of the Court? A. Yes.

Q. When did you, as attorney for the trustee, receive notice of the disallowance for the claim for abatement?

A. I would not have in mind the date of that.

Q. But you did receive notice?

A. It came in due course of time.

Q. And after you received notice and paid out this tax, you filed a claim for refund?

A. Yes. [34]

Q. And it was also denied? A. It was.

Mr. Winter: That is all.

Redirect Examination

By Mr. DeGarmo:

Q. What was the reason that you filed the claim for refund on this stamp tax which had been paid?

A. It was discovered that the wine was not salable or usable wine.

Q. In other words, after this \$6,000 and more had been paid, then the wine could not be sold by the purchaser?

Mr. Winter: That is objected to as a conclusion and not proper examination.

The Court: On cross examination that is per-

(Testimony of Thomas E. Grady.)

missible. This is cross examination of the cross examination.

Mr. DeGarmo: I think that is all.

Recross Examination

By Mr. Winter:

Q. As a matter of fact, you sold it for \$12,000, didn't you, as trustee? A. Yes.

Q. And then you don't know, of your own knowledge, how much Mr. Rovig sold in the open market, do you, of your own knowledge? A. No.

Mr. Winter: That is all.

Further Redirect Examination

By Mr. DeGarmo:

Q. You do know that the bulk of it burned up after this, don't you? [35] A. Yes.

Q. You also knew that the government refused to confirm the sale of it? A. It did.

The Court: Is that all?

Mr. DeGarmo: That is all.

(The witness was excused.)

Mr. DeGarmo: Mr. Murray, will you take the stand, please?

A. W. MURRAY

was called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you please state your name?

A. A. W. Murray.

Q. Mr. Murray, you reside in Seattle, do you?

A. Yes, sir.

Q. And what is your business?

A. I am superintendent of the Claim Department of the United States Fidelity and Guaranty Company for the State of Washington.

Q. That is the United States Fidelity and Guaranty Company who is one of the defendants in this action?

A. Yes, sir.

Q. As superintendent of the Claim Department, do you have charge of recoveries on bonds?

A. I have charge of claims made against or on account of [36] bonds.

Q. And during the course of your duties as superintendent of the claim department, did the matter of the bonds written by the United States Fidelity and Guaranty Company for the Coast Wineries, Inc. come to your attention?

A. Yes.

Q. You are familiar with the two bonds which were given by the U. S. F. & G. to the government on behalf of the Coast Wineries, Inc., and which are in evidence in this case?

A. I am.

(Testimony of A. W. Murray.)

Q. At the time those bonds were written, or subsequently, did the United States Fidelity and Guaranty Company ask for or require indemnity on their behalf?

A. At the time the bonds were written, the indemnity agreements were taken from Mr. Hubbert, an attorney at Yakima, Mr. Dolph, of Spokane, now deceased, and several others.

Q. Mr. Murray, I hand you what has been marked "Plaintiff's Exhibit No. 2." Will you state whether the United States Fidelity and Guaranty Company, of which you are superintendent of the Claim Department, received the original of that letter? That is the notice of the determination by the government on the surety.

A. Yes, I received the original.

Q. Subsequent to the receipt of that letter, did you make any investigation concerning possible liability of the defendant, United States Fidelity and Guaranty Company, upon the bonds?

A. Yes. I had several conferences with the alcohol tax unit in Seattle.

Q. Were those conferences with any particular individual? [37]

A. I talked with Mr. Jackson who was, I understood, attorney for the alcohol tax unit—with Mr. Jackson particularly, and I may have had a discussion or two with Mr. Jordan.

Q. And subsequent to the receipt of this order

(Testimony of A. W. Murray.)
of determination which, I think, is dated June 6, 1935— A. Yes, June 6, 1935.

Q. Did you have a conversation with Mr. Jackson in Seattle at the office of the alcohol tax unit in which you discussed with him the matter of possible liability under your bonds?

A. I did.

Q. Will you state what that conversation was?

Mr. Winter: I object to that on the ground that it is irrelevant and immaterial and not within the issues of this case.

The Court: I will receive it; it may go in the record.

Mr. Winter: As a matter of fact, the witness has not testified as to what the official position of Mr. Jackson was.

Mr. DeGarmo: He said he understood he was attorney for the alcohol tax unit.

Mr. Winter: If he understood a fact that was not so, it would be very material whether or not he should be able to testify; if he did not, then he would be testifying to something that was not true.

The Witness: He was so represented to me as attorney for the alcohol tax unit. He was the man to whom I was referred to discuss the matter as having charge of it.

By Mr. DeGarmo:

Q. Will you state what the conversation [38] was?

(Testimony of A. W. Murray.)

A. The conversation was with reference to protecting ourselves by filing a claim in bankruptcy, primarily, and also in regard to the nature of the tax for which demand was made, and I received an explanation of the various items of tax from Mr. Jackson, which was incorporated in a report to me and my office, as I was not familiar with the practice of the government or the nature of the taxes that were sought to be recovered. At that time, it was agreed that the government—

Q. State what was said, not what occurred.

A. I asked him what about filing a claim in bankruptcy, and he stated that he thought the government would file a claim; so the matter rested at that point.

Q. Now, on a subsequent occasion, did you have another conversation with him concerning the course which the government was taking with respect to this claim in the bankruptcy proceeding, or with some other representative of the alcohol tax unit?

A. I could not say it was with Mr. Jackson, but I did have other conferences with other members of the alcohol tax unit office.

Q. Did you, at any time, Mr. Murray, learn that the claim of the government had been withdrawn for the tax that they had filed a claim for?

A. I did, but not in the office of the alcohol tax unit in the first instance.

Q. From whom did you learn that?

(Testimony of A. W. Murray.)

A. From Judge Grady on a trip that I made to Yakima in which he described the progress of the bankruptcy and the [39] claims.

Q. Now, you have stated that Mr. N. J. Dolph was one of the indemnitores on these bonds in this case? A. Yes, sir.

Q. Was Mr. Dolph a responsible individual who could have been held responsible on a claim had one been filed against his estate?

A. He is in—

Mr. Winter: (Interposing) Objected to as calling for a conclusion of the witness. The record of the estate would be the best evidence.

Mr. DeGarmo: I anticipated that counsel would object, and I have a certified copy of the inventory and appraisal here, and I will ask that this be marked as Defendant's Exhibit A-12 for identification.

(The document above referred to was marked for identification as "Defendant's Exhibit A-12.")

Mr. DeGarmo: I offer in evidence as "Defendant's Exhibit A-12," certified copy of the inventory and appraisal of the estate of Norman J. Dolph, in the Superior Court of Spokane County.

Mr. Winter: Objected to as irrelevant and immaterial. It does not show when it was filed or anything of that nature, and it does not appear to be within the issues of this case.

(Testimony of A. W. Murray.)

The Court: Ruling reserved.

Mr. DeGarmo: Mr. Clerk, will you mark this for identification, please?

(The document above referred to was marked "Defendant's Exhibit A-13" for identification.) [40]

Mr. DeGarmo: This is a certified copy of the notice to creditors published in the Dolph estate showing when the time for filing creditors' claims expired.

I now offer A-13.

Mr. Winter: The same objection, your Honor, as being irrelevant and immaterial.

The Court: Ruling reserved.

By Mr. DeGarmo:

Q. Mr. Murray, after receiving notice from the government, notice and demand, of June 6, 1935, did you take steps to press a claim against the estate of Mr. Dolph?

A. I did. I notified the administratrix of the estate, who was Mrs. Dolph.

Q. Now, subsequent to receiving word that the claim of the government for \$9,000 had been withdrawn, what action did you then take with respect to a claim against the estate?

A. I did not take any further action.

Q. You did not file a claim when you found that claim had been withdrawn?

(Testimony of A. W. Murray.)

A. No. I took no further action whatever in the entire matter.

Q. As a matter of fact, Mr. Murray, wasn't that claim closed in this matter for some two years?

A. Yes, sir.

Q. When was it reopened?

Mr. Winter: Objected to as irrelevant and immaterial. As to when the claim was opened or closed is immaterial.

The Court: It will be received.

A. Oh, after receiving a new demand for the \$3,000 tax, [41] approximately, I reopened the file.

By Mr. DeGarmo:

Q. Can you refer to your file and give me the date when you received that demand, or the last demand?

The Court: Which one is that to which you are referring?

Mr. DeGarmo: The one of June 6, 1935, the original demand.

The Court: Isn't that sufficient?

Mr. DeGarmo: After this thing had all been closed, they came back with this second demand for \$3,156 which they are now suing for. This was all closed and they came back with a second demand.

Mr. Winter: It is the formal demand. The letter of June 6th is not a demand.

(Testimony of A. W. Murray.)

The Court: That is not?

Mr. Winter: No, your Honor. The letter of June 6th is notifying the bonding company. The letter says, "Notice is hereby given of your liability to the extent of your bonds for any such taxes not collected from the bankrupt estate, in order that you may take any action you may deem necessary."

In other words,—

The Court: (Interposing) I do not know about the other words. Will you tell us?

Mr. Winter: I have a copy of it, I think, your Honor (counsel referring to a paper). Yes, here it is. It is March 9, 1939.

The Court: March 9, 1939; is that right?

Mr. Winter: I have a copy of it, your Honor. It [42] is a registered letter.

The Court: A demand for claim?

Mr. DeGarmo: That is right.

Mr. Winter: Counsel admitted the demand on the bankrupt.

Mr. DeGarmo: I will offer this in evidence.

Mr. Winter: May I substitute a copy? This is my own personal copy.

The Court: That may be withdrawn from the file and later file a copy.

(The document above referred to was marked "Defendant's Exhibit A-14" for identification.)

(Testimony of A. W. Murray.)

Mr. DeGarmo: "Defendant's Exhibit A-14," I understand it is stipulated that that is a copy of the notice which was received by the defendants for the tax sued on herein?

Mr. Winter: Yes.

The Court: Proceed.

By Mr. DeGarmo:

Q. As I understand it, no claim was filed against Norman J. Dolph's estate for liability under these bonds? A. No, sir.

Q. Was any claim filed in bankruptcy against the Coast Wineries, Inc. under the bonds by the United States Fidelity and Guaranty Company?

A. Yes.

Q. In bankruptcy?

A. Of the Coast Wineries?

Q. Yes, by the defendant, United States Fidelity and Guaranty Company. [43]

A. Not by the United States Fidelity and Guaranty Company, but by the United States.

Mr. DeGarmo: I think that is all. You may examine.

The Court: Cross-examine.

Cross Examination

By Mr. Winter:

Q. Mr. Murray, who did you say you had as guarantors of the bond, or as guarantee to the pay-

(Testimony of A. W. Murray.)

ment of the bond in the event there was any liability on the bond? A. N. J. Dolph.

Q. Was it not J. J. Dolph? A. Yes.

Q. Who else? A. Mr. Hubbert.

Q. What are his initials?

A. Mr. W. A. Hubbert, and Mrs. Hubbert.

Q. And Mrs. Hubbert? A. Yes.

Q. Who else?

A. I think there was a man by the name of McKenzie (witness referring to paper)—C. T. McKenzie, and Bertha McKenzie.

Q. Do you have any other indemnitor agreements there? A. No, sir; I have none.

Q. When was Mr. Dolph's indemnity agreement taken? A. The date does not appear.

Q. This indemnitor agreement—

A. (Interposing) That is one of them. I think there were two bonds. That is on the \$5,000 bond.

Q. That is on the \$5,000 bond? [44]

A. Yes. I think this is a part of it (witness referring to papers).

Q. Then, for any liability agreement on the bond prior to January 5, 19—or January, 1935, you would not have any indemnity—you would not be entitled to indemnity from the Dolph estate, would you, Mr. Murray, on that \$5,000 bond?

A. I don't know whether this is a renewal. I believe the bonds were renewed, and I also had an indemnity agreement on the original bond. That would be attached to that.

(Testimony of A. W. Murray.)

Q. Isn't it a fact, Mr. Murray, that Mr. Dolph did not go into the company until about January, 1935, and you released Mr. Hubbert in 1935 and you took Mr. Dolph as indemnitor on the bond?

A. No.

Q. Are you sure about that?

A. I am sure that I never released Mr. Hubbert.

Q. You are sure that you never released Mr. Hubbert? A. Yes.

Q. At least, you had an indemnity agreement with Mr. Hubbert about a year before you had an indemnity agreement with Mr. Dolph; isn't that true?

A. Yes, we had an indemnity agreement from Mr. Hubbert in 1934.

Q. In 1934? A. Yes.

Q. Covering the year 1934?

A. Well, covering any loss that might be occasioned by the bond that was then executed, whenever it would occur. If you can give me a little more time on this, I can find it, perhaps, Mr. Winter. The file is voluminous (witness refers [45] to papers). I haven't the original indemnity agreement here, but I have a copy of the report on the bond, executed on February 1, 1934, in which it—I think it is noted that we had an indemnity with N. J. Dolph.

Q. By Mr. Hubbert, you are referring to the Mr. Hubbert who is here in court, and his initials are what? A. W. A. Hubbert.

(Testimony of A. W. Murray.)

Q. W. A. Hubbert? A. Right.

Q. Do you know when the liability for the tax accrued under these bonds? A. I do not.

Q. Haven't you been advised time and time again that it was after 1934, and not for 1935?

A. That is a matter of record. The record would so show.

Q. Do you have a copy of the notice, or the notice which you gave the executrix of the Dolph estate as to contingent liability under the bond?

A. Yes, I do.

Q. Have you got it with you?

A. I believe so.

(The witness produced some papers.)

Mr. Winter: I will ask that these be marked as Plaintiff's Exhibits 6 and 7 for identification.

(The documents referred to were marked "Plaintiff's Exhibit No. 6" and "Plaintiff's Exhibit No. 7" for identification.)

By Mr. Winter:

Q. Do you have the registered receipt?

A. Yes, I have. Here is a registered receipt from Mrs. [46] Dolph and Mrs. Hubbert (witness producing some papers).

Q. You did send these registered, these which are marked for identification as "Plaintiffs Exhibit 6" and "7"? You sent them by registered mail, and these are copies of the letters which you mailed? A. That is right.

(Testimony of A. W. Murray.)

Mr. Winter: We will offer them in evidence.

Mr. DeGarmo: There is no objection.

(The documents previously marked "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7" for identification were received in evidence.)

By Mr. Winter:

Q. You haven't released Mrs. Dolph as indemnitor or an an executrix, under the bond, have you, Mr. Murray, by any action on your part?

A. There is nothing to release her from, so far as herself is concerned.

Q. As a matter of fact, Mr. Murray, you told me personally that you had indemnity on the bond, and that was the reason why we could not get together on the amount due on the bond; isn't that right?

A. Absolutely correct.

Q. How? A. That is absolutely correct.

Q. Yes.

Mr. Winter: That is all.

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Murray, after you sent these letters, which have been introduced in evidence, one of them to Mrs. Dolph, you had considerable correspondence with Heil, Davis, and Heil [47] of Spokane, the attorneys representing the Dolph estate?

A. I did.

(Testimony of A. W. Murray.)

Q. And in those letters, did they indicate to you that if any claim was filed, they would disallow it on the ground that the claim had been withdrawn by the government?

Mr. Winter: That is objected to upon the ground that it is hearsay and not binding on the United States, and not proper redirect examination.

Mr. DeGarmo: I asked Mr. Murray whether after these letters had been sent, one to Mrs. Hubbert, one to Mr. Hubbert, and one to Mrs. Dolph, he had considerable correspondence with Messrs. Davis and Heil, attorneys at Spokane, representing the Dolph estate, regarding this claim for indemnity in which they indicated that if any claim was filed against the estate, they would disallow it upon the ground that the government had withdrawn its claim against the bankrupt.

Mr. Winter: I object, if the Court please, upon the ground that it is hearsay and not binding upon the United States.

The Court: I think this objection will be sustained. It is sustained.

Mr. DeGarmo: I will withdraw the question. That is all, Mr. Murray.

(The witness was excused.)

Mr. DeGarmo: That is our case, if your Honor please.

The Court: Is that the defense?

Mr. DeGarmo: That is the defendant's case, if your Honor please. [48]

The Court: Has the government any rebuttal?
(There was a discussion off the record.)

The Court: The court will take a recess until two o'clock.

(Whereupon, at 12 o'clock noon, a noon recess was taken until 2 o'clock p. m. of the same day.) [49]

Afternoon Session

(Two o'clock)

The Court: You may proceed.

Mr. Winter: If the Court please, in order that there may be no misunderstanding, counsel seems to be a little confused about what was done in this matter.

We will offer in evidence the certified photostatic copy of the claim for refund, Form 843, for the \$732.22, which was filed, and refund allowed, which is the claim under the third affirmative defense.

The Court: Is there any objection?

Mr. DeGarmo: No, I have no objection. I have seen these.

The Court: Admitted.

(The document referred to was marked "Plaintiff's Exhibit No. 8" and received in evidence.)

Mr. Winter: And we admitted it by our reply.

The Court: Is there any rebuttal evidence?

Mr. Winter: Yes, your Honor. Counsel has handed me, and it appears in the record, a certain statement made to the referee in bankruptcy by myself and Mr. Grady, which I will agree can be marked as an exhibit for identification.

(The document referred to was marked
"Plaintiff's Exhibit No. 9" for identification.)

Mr. Winter: We will offer it, your Honor, if counsel has no objection.

Mr. DeGarmo: I have no objection.

The Court: What is that?

Mr. Winter: This is a transcript of the reporter's notes of the hearing before the Special Master on September [50] 18, 1935—September 28, 1935, and I want also the minutes of the 18th of September, 1935.

Mr. DeGarmo: I will give them to you, Mr. Winter.

Mr. Winter: I will ask that it be marked as one exhibit, because they follow in order.

I will ask to be sworn, if the Court please.

THOMAS R. WINTER

produced himself as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Winter: If the Court please, I might explain that Mr. Shucklin is engaged in the trial of another case at two o'clock.

The Court: All right.

Mr. Winter: My name is Thomas Winter.

Mr. DeGarmo: I will admit Mr. Winter's qualifications.

The Court: All right.

Mr. Winter: My name is Thomas Winter. I am special attorney, Bureau of Internal Revenue, and I have been since October 7, 1929.

The Court: Propound the questions, and counsel can object, if he likes.

Mr. Winter: Government's Exhibit 9 is a substantial statement of all agreements or understandings I had with Judge Grady relative to the claims of the United States before the Trustee in Bankruptcy.

Mr. DeGarmo: Just a moment, please. I will object to that. Exhibits 9 and 10 are transcripts of the record and [51] statements made before the Master at the time of the hearing. Judge Grady's testimony was that the agreement to which he referred was made in the court room, but not before the Master, and we further object to the question upon the ground that, as propounded, it is a leading question,

(Testimony of Thomas R. Winter.)

in the first place; and in the second place, it calls for the witness to dispute the record which he himself has introduced.

The Court: The objection will be sustained. Judge Grady's testimony was that this conversation was immediately preceding.

(The following questions were propounded by Mr. Winter and answered by Mr. Winter.)

By Mr. Winter:

Q. What time did you arrive in Yakima on September 18, 1935?

A. I arrived in Yakima a few minutes before the morning session at ten o'clock on *October 35*, because I was driving my automobile, and I left Seattle in time just to arrive there at that time.

Q. Did you have any conversation with Judge Grady on September 18, 1935, before the hearing?

A. I did not.

Q. Did you state to the Court substantially, the Referee, substantially as is set forth in Exhibit 9?

A. I did.

Q. Did you make any other representations other than those set forth therein to Judge Grady at any time? A. I certainly did not.

Q. Did you inform Judge Grady as to whether or not the claim for refund—I mean the claims, would be withdrawn?

A. I informed Judge Grady on several occasions that in view [52] of the order of Judge Webster,

(Testimony of Thomas R. Winter.)

whereby he directed the trustee to pay all of the withdrawal and gallonage taxes; that we would not know what part of the claim would be allowable and what would not, and that it was thought that the full amount of the tax would be paid in the withdrawal tax, and that, in my opinion, in the present case, I had some question as to the merits of the tax liability, and I would recommend the abatement of the balance if all the gallonage tax was paid. I made the same recommendation to the collector's office, which was the result of the letter of June 6. A copy of that letter was forwarded to my office.

Q. When was the last time you discussed the allowance or rejection of the government's claims, being the claim for \$500 and \$76, I believe?

A. I discussed those claims—I never discussed those claims with Judge Grady, because they were always continued because of the uncertainty of the \$9,000 claim. They only involved a question of law as set forth in this exhibit. There was no serious objection to them. I have spoken to Judge Grady as to the National Recovery Act, then declared unconstitutional; but that the tax was, while it was a part of that act, the unconstitutionality, as determined by the Supreme Court, did not affect the tax which was imposed under that act, and I was successful in convincing Judge Grady.

The Court: Just what was it that was said here just before the noon recess, I believe it was, with

(Testimony of Thomas R. Winter.)

reference to the claims which were recommended for allowance?

Mr. Winter: They were the claims recommended for allowance prior to the filing of the letter advising the clerk that the claim had been withdrawn. [53]

The Court: And you are speaking now of which claims?

Mr. Winter: I am speaking of the claims for \$500 and \$76.

The Court: All right.

Mr. Winter: Yes. Judge Grady, on September 28, 1935, at the hearing before the Special Master, recommended that the \$500 capital stock tax claim and the other \$76 tax claim be allowed to take priority under Section 64-A.

By Mr. Winter:

Q. Had the claim—the \$9,000 claim, been withdrawn at that time?

A. No. No notice had been given of that claim for abatement, which is Government's Exhibit 1. No such claim had been filed with the collector.

The Court: May I suggest that you perhaps should speak a little more slowly and a little more loudly. I imagine that you are talking not less than 250 or 300 words a minute.

Mr. Winter: Thank you, your Honor.

Q. When was the first time that you learned that there was any contention made that the \$500

(Testimony of Thomas R. Winter.)

and the \$76 claims were to be allowed because the government had withdrawn its proof of claim for the \$9,000 claim?

A. This morning in court.

Q. Was there ever anything said to you by Judge Grady that he would allow the claim of \$500 and the \$76 if you would withdraw the claim?

A. Nothing.

Q. What was the reason for withdrawing the \$9,000 claim, if you know? [54]

Mr. DeGarmo: Now, just a moment, if the Court please. The record will speak for itself.

The Court: Yes, I think so. That is a matter that would be disclosed by the record.

Mr. Winter: That is all.

The Court: Cross examine.

Cross Examination

By Mr. DeGarmo:

Q. Mr. Winter, do I understand you to say that you arrived in Yakima on the morning of September 18, 1935, and that you had no conversation with Judge Grady before you proceeded with the hearing?

A. I did not on September 18; I talked with him the Monday previous.

Q. You talked with him the Monday previous?

A. Yes.

Q. Now, I want you——

(Testimony of Thomas R. Winter.)

A. (Interposing) But not about the \$500 or the \$76 claim.

Q. Now, I want you to explain this to me:—

A. Yes.

Q. I am now reading from your Exhibit No. 9, in which you stated to the Special Master as follows:

“Now, will the Court continue the hearing on the Government \$9,000 claim until some later date, in order that the claim in abatement might be filed, and in all probability the claim will be withdrawn if the claim in abatement is allowed?”

The Master said, “There is just a possibility of that?”

To which you answered, “Well, it has developed [55] into more than a possibility, as I have advised Judge Grady”?

A. Yes.

Q. Now, when did you advise Judge Grady that it had developed into more than a possibility that the claim for abatement would be withdrawn, and that the claim was withdrawn?

A. I advised Judge Grady before we finished the hearing before Judge Webster in Spokane. I have always understood that the claim for \$9,000 would be withdrawn if the claim for the abatement was allowed, and it was not known how much

(Testimony of Thomas R. Winter.)

of the \$9,000 claim would be abated by the order of the court. By the order of the court, the trustee paid out practically all of the claim, with the exception of \$3,000.

Q. All right. And you went ahead and stayed on the matter personally right in the abatement of the claim, in view of the situation in this matter? A. That is right.

Q. But so far as the other two claims, we have two separate claims? A. Yes.

Q. And one of the others was the claim in the amount of \$500 for capital stock tax assessed under Section 3151, which Judge Grady filed, and the other one was for \$76.20? A. Yes.

Q. Those two claims were also mentioned at this hearing?

A. Yes, they are mentioned as separate claims.

Q. Then, am I to understand from your testimony that at this hearing before the Court on the 18th of September, 1935, that you had assured Judge Grady that this claim for \$9,000 [56] was going to be withdrawn?

A. That is all we talked about. We did not talk about the other claims?

Q. You did not?

A. We talked about the other claims, yes. We knew they would not be abated in the bankruptcy proceedings.

Q. You do not answer my question. The question was whether at the original hearing, which

(Testimony of Thomas R. Winter.)

was on the 18th of September, 1935, you had assured Judge Grady that the claim for \$9,000 would be withdrawn?

A. No, I never assured him——

Q. As a matter of fact, did you recommend that to the Internal Revenue Department?

A. Yes.

Q. You said it was to be withdrawn because they were getting the tax out of the order of the court?

A. The withdrawal of the tax—until it was determined, there was nothing to litigate.

Q. By the way, on that question, Mr. Winter, this morning several statements were made that the amount of tax which was paid out of the \$12,000 purchase price which Mr. Rovig paid was the amount of \$6,000. It is a fact, is it not, that the total tax which was paid out of the \$12,000 to the United States Government was \$9,171.62?

A. It is not a fact, the way you state it.

The Court: What was the amount paid?

The Witness: There was that amount paid for purchasing stamps, yes; but only \$5,000—\$5,200——

Q. I am asking you a question.

A. Well, I am trying to explain it. [57]

Q. I have asked the question whether the amount which was paid out of the purchase price of the \$12,000 was not \$9,172.60 in tax to the United States Government.

A. I don't know whether it was paid out of

(Testimony of Thomas R. Winter.)

the \$12,000. I know stamps were purchased in the amount of some \$9,000. Let's see that exhibit, Mr. Clerk.

(The clerk handed some papers to the witness.)

A. (Resumed) \$9,171.62 was paid. Of course, all of the tax which was paid by stamp was——

Q. Let's see if I understand this. Under the order this was sold for \$12,000?

A. That is right.

Q. Out of the purchase price, the government collected \$9,171.62 in tax, and they now want \$3,162.56 more as tax upon this same wine?

A. That is right. That was the total tax liability against that wine.

Q. So that I am to understand, then, that the government, out of the wine which it sold for \$12,000, wants more than \$12,000 for tax?

A. No, that is not right.

Q. That is what you are asking for, isn't it.

A. That is not so.

The Court: Just give these figures.

The Witness: There was assessed \$9,200 and some odd dollars in tax.

The Court: Do you have the actual figures there?

The Witness: Yes, your Honor. If I can get the claim for refund there—I mean the original exhibits.

(Counsel handed a paper to the witness.)

(Testimony of Thomas R. Winter.)

The Witness: There was assessed against the wine as of that date, \$9,387.21. That tax covered——

The Court: Now, then, the figures you mentioned previously were what?

The Witness: \$3,162.56, which is the tax on 10,541 barrels—gallons of mixed wine.

The Court: Proceed, Mr. DeGarmo.

By Mr. DeGarmo:

Q. Mr. Winter, you have stated that on the 28th day of July, 1935, Judge Grady recommended to the Special Master the allowance of the \$500 capital stock tax claim and \$76 stock tax claim?

A. Yes.

Q. Isn't it a fact that from this exhibit, this statement was made by you to the Court:

“Mr. Winter: With respect to the claim of the United States for nine thousand and some odd dollars, the trustee has duly filed a claim in abatement with the Collector of Internal Revenue seeking the abatement of the full amount covered by this claim”?

A. Yes.

Q. “and in view of the order of the court authorizing and directing the trustee to purchase and cancel stamps on the wine sold to R. D. Rovig, I am recommending to the Commissioner of Internal Revenue aforementioned claim be abated, in which event the claim will be withdrawn.

(Testimony of Thomas R. Winter.)

“It is, therefore, requested that an extension be granted of ten days in order to allow administrative action to be taken by the Bureau of Internal Revenue.

“The Master: Motion granted,” and immediately Judge [59] Grady said——

A. (Interposing) Then we finished with the \$9,000 and——

Q. I am just taking the transcript of the record. Then Judge Grady said, “The trustee recommends to the Master that the \$500 capital stock stamp tax claim, and the other \$76 stock tax claim be allowed to take the priority under 64-A”?

A. It was on——

Q. It was at that hearing that Judge Grady withdrew his objection and recommended the allowance of those two claims to the Special Master?

A. He did not make any allowance of those claims, because I was recommending the abatement of that claim.

The Court: Isn't that about the condition of the record?

The Witness: That is the way, if your Honor please, that I recall it. It would be the natural thing to check these claims up afterwards, but there was no representation made to Judge Grady.

The Court: Are you about through with the cross examination?

Mr. Winter: I think the exhibits speak for themselves, your Honor.

(Testimony of Thomas R. Winter.)

The Court: Very well.

Mr. Winter: That is all.

The Court: Do both sides rest?

Mr. Winter: No. I have one more witness, your Honor. I will call Mr. Trace. [60]

RUSSELL TRACE

was called as a witness by and on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name, please? A. Russell Trace.

Q. And what is your occupation, Mr. Trace?

A. Chief of the Miscellaneous Tax Division, Bureau of Internal Revenue.

Q. And with offices at Tacoma?

A. At Tacoma; yes, sir.

Q. On October 15, 1937, did you occupy—on October 15, 1937, you say that you occupied that office—that position? A. Yes, sir.

Q. Have you brought with you the original records—I mean the records of the Collector of Internal Revenue? A. I have.

Q. Showing the assessments and the abatement, if any, of any schedules having been submitted to

(Testimony of Russell Trace.)

the Collector of Internal Revenue of the tax here in question? A. Yes, sir.

Q. Will you hand them to me, please?

(The witness handed some cards to counsel.)

Mr. Winter: Mr. Clerk, may I have this marked for identification?

(The document referred to was marked "Plaintiff's Exhibit No. 11" for identification.)

By Mr. Winter:

Q. I will show you what has been marked for identification [61] "Plaintiff's Exhibit No. 11." Was that prepared under your supervision and direction? A. Yes, sir.

Q. What does that record show?

A. It shows the assessment list and the amount of the assessment, the amount paid and the amount credited and the amount outstanding.

Q. What is the amount outstanding on the collector's records at the present time?

A. Three thousand——

Mr. DeGarmo: Just a moment. The amount outstanding as of what time?

By Mr. Winter:

Q. It shows the amount of tax outstanding from the Coast Wineries at the present time, does it?

A. Yes, sir.

Q. Does it show any claims for abatement which have been filed? A. Yes, sir.

(Testimony of Russell Trace.)

Q. Does it show that any claims were paid?

A. Yes.

Q. It is a complete record of any action taken with respect to that assessment; is that true?

A. Yes, sir.

Mr. DeGarmo: Action taken by whom?

A. By the Commissioner of Internal Revenue, Washington, D. C.

Mr. Winter: I will offer in evidence "Plaintiff's Exhibit No. 11."

Mr. DeGarmo: I wish to make the same objection to [62] that which I made this morning, to the attempt to offer some evidence by a certified copy. It is our position that the government is bound by the record in the bankruptcy proceedings. Regardless of what the collector's records may show, the government is bound by the adjudication in the bankruptcy proceeding.

The Court: The ruling is reserved.

By Mr. Winter:

Q. I will show you "Defendant's Exhibit A-7." Will you state to the Court whose initials appear in the left-hand corner of that instrument?

A. I would say that is the initial—the initials of the one who dictated the letter. I would say that the typist——

Q. Who was that that dictated that letter?

A. It was Ethel Bloomquist.

(Testimony of Russell Trace.)

Q. She is not now in the office?

A. She is not in the office.

Q. What was her official position at that time?

A. She was a clerk—deputy clerk collector.

Q. I will ask you whether or not there was any record of the \$9,387.27 referred to on the first page of Claim No. 2 filed under date of June 7, 1935, about any abatement of that tax as of that date, or subsequent thereto.

Mr. DeGarno: Now, if your Honor please, that is an attempt to contradict by his testimony the letter which the Collector of Internal Revenue filed with Judge Webster in the bankruptcy proceeding, in which the definite statement was made that this claim had been abated, and acting upon that, the judge, the referee, or master says, "withdraw the claim," or said that it was withdrawn. [63]

The Court: Let's see it.

(Counsel handed a paper to the Court.)

The Court: Is there a copy of this letter in evidence?

Mr. DeGarmo: Yes, that is the copy.

Mr. Winter: That is a copy, your Honor, over our objection, as being merely a letter from the collector, and the abatement can only be made, under the statute, by the Commissioner of Internal Revenue.

The Court: I will reserve the ruling.

(Testimony of Russell Trace.)

By Mr. Winter:

Q. Tell us when that claim was filed.

A. The claim was dated September 19, 1935, and on March 15, 1937, the Commissioner adjudicated the claim by allowing \$6,224.65, and rejecting the \$3,162.56, amounting to a total of \$9,387.21, for which the claim was filed.

Q. Then I take it that on September 19, 1935, there was a claim for abatement received, which would be about eight days prior to the letter of October 15, 1935, and claim was pending on October 15, 1935, which your records show was forwarded to the bureau under what date?

A. Forwarded to the Bureau on October 14, 1935.

Q. Does it show the recommendation of the Collector?

A. The recommendation of the Collector?

Q. Yes.

A. I would have to read it to see.

Mr. Winter: I will withdraw that.

By Mr. Winter:

Q. The action was really in March—on March 15, 1935? A. Yes, sir. [64]

Q. And subsequent to that time you filed, or attempted to file, with the Referee in Bankruptcy a claim for the amount for which it had been rejected?

(Testimony of Russell Trace.)

Mr. DeGarmo: Now, just a minute. Whether he filed or attempted to file—he has asked the witness two questions in one.

Mr. Winter: I asked him whether he filed or attempted to file.

A. Well,—

Mr. DeGarmo: You cannot answer that question.

The Court: Just ask one question at a time.

By Mr. Winter:

Q. They forwarded to the Referee—they filed with the Referee a claim for refund in which—

Mr. DeGarmo: As to that, if the Court please, the record in the bankruptcy proceedings will speak for themselves.

The Court: Objection sustained.

Mr. Winter: Are the records in the bankruptcy proceedings here?

Mr. DeGarmo: It is here.

The Court: It is a question of when it was filed.

Mr. Winter: I think that is all.

Mr. DeGarmo: I do not desire to cross examine this witness, if your Honor please, because I do not want to waive my objection to any of his testimony.

The Court: If you cross examine him, I will allow you.

(Testimony of Russell Trace.)

Cross Examination

By Mr. DeGarmo:

Q. The only question I have, Mr. Trace, [65] is this: Did I understand your testimony that at the time the office of the Collector of Internal Revenue in Tacoma, the Clerk of the Superior Court, or the Clerk of the Federal Court in Spokane, stating that this claim had been abated, that there was nothing in the record of the Collector's office to substantiate that statement?

A. That is absolutely true; there was nothing.

Q. There was nothing?

A. No, sir. The intent of that letter was——

Q. I didn't ask you about the intent.

Mr. Winter: He can explain his answer.

By Mr. DeGarmo:

Q. There was nothing left whatever?

A. No, sir.

Mr. DeGarmo: That is all.

The Court: The next witness.

Redirect Examination

By Mr. Winter:

Q. What did you receive at that time?

Mr. DeGarmo: He said there was nothing there.

The Court: Yes. The objection is sustained.

Call your next witness.

Mr. Winter: That is all.

(Testimony of Russell Trace.)

The Court: Do both sides rest?

Mr. Winter: We rest.

Mr. DeGarmo: We rest.

The Court: I have some filed briefs handed to me this morning on my desk. Do you desire to brief the case?

Mr. Winter: We would like an opportunity to reply. We have not seen counsel's brief, and if a reply is necessary, [66] we desire to file a brief in reply.

The Court: I would like to have you brief your facts.

Mr. DeGarmo: I would like to speak orally on the fundamental——

The Court: You can brief your facts as fully as you may desire.

Mr. DeGarmo: That is satisfactory to me.

Mr. Winter: That is satisfactory to me.

(There was further discussion.)

The Court: Very well. If there is nothing else, the Court will adjourn until next Monday.

(Whereupon, at 2:42 o'clock p. m., the hearing in the above-entitled matter was adjourned.)

[Endorsed]: Filed Feb. 16, 1942. [67]

[Endorsed]: No. 10061. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Coast Wineries, Inc., a corporation, and United States Fidelity

and Guaranty Company, a corporation, Appellees.
Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 21, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10061

UNITED STATES OF AMERICA,

Appellant,

v.

THE COAST WINERIES, INC., a corporation,
and the UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

Comes now the appellant, United States of America, in compliance with Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit and states that upon the appeal it intends to rely upon the following points:

(1) That part of Finding of Fact No. IX made and filed in the District Court of the United States for the Western District of Washington, Northern Division, which purports to find that the claim of the United States covering the taxes sought to be recovered in the action on the bonds was withdrawn pursuant to an agreement between the attorney for the appellant and the attorney for the trustee to withdraw objections to the other claims filed in that proceeding, is erroneous and not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

(2) That part of the Finding of Fact No. X made and filed by the District Court of the United States for the District of Washington, Northern Division, which purports to find that the claim of the United States had been withdrawn under the circumstances and pursuant to an agreement set forth in Finding of Fact No. IX, is erroneous and not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

| (3) That Finding of Fact No. XI is erroneous and is not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

(4) That Conclusions of Law Nos. I, II and III, made and filed by the District Court of the Western District of Washington, North-

ern Division, and each thereof, are erroneous and are not supported in law and are contrary to the evidence produced at the trial of this cause.

(5) That the District Court for the Western District of Washington, Northern Division, erred in entering its judgment of July 7, 1941, dismissing the above-entitled action with prejudice.

(6) That the District Court for the Western District of Washington, Northern Division, erred in failing to find that the United States of America, appellant, was not precluded from maintaining the above-entitled action on the assessment because of the disallowance by the District Court for the Eastern District of Washington of the claim filed by the United States of America, appellant, in the bankruptcy estate of the principal on the bond based upon said assessment.

(7) That the District Court for the Western District of Washington, Northern Division, erred in concluding that the order of the District Court for the Eastern District of Washington expunging and disallowing the claims filed in the bankruptcy estate of the principal on the bond was a judgment on the merits and was *res judicata* in this action on the bonds.

(8) That the District Court for the Western District of Washington, Northern Division,

erred in its failure to make and enter Findings of Fact, Conclusions of Law and Judgment for the United States of America, appellant, against the appellee, United States Fidelity and Guaranty Company, in the amount for which the action was brought and for costs of suit herein.

Appellant further designates for consideration of the foregoing points the entire certified transcript.

Dated this 24th day of Feb., 1942.

J. CHARLES DENNIS,
United States Attorney.

GERALD SHUCKLIN,
Assistant United States
Attorney.

THOMAS R. WINTER,
Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Copy of within Received 2-24-42.

ALLEN, HILEN, FROUDE, & DeGARMO,
Attorneys for U. S. F. & G. Co.

[Endorsed]: Filed Feb. 27, 1942. Paul P. O'Brien,
Clerk.